NO. 86-58

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

FRED S. JAMES & CO. OF TEXAS, INC.
Petitioner

VERSUS

EQUILEASE CORPORATION,
M/V SAMSON, M/V THOR, and M/V HERCULES, ETC.
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a creditor of a vessel who looks to the real owner and the earnings of the vessel for payment but who expressly states that he intends to give up nothing, waive his right to a maritime lien.

2. May an appellate court reverse a trial court's implicit finding of fact without a showing of the finding being clearly erroneous.

3. Is there a true demise or bareboat charter of the vessel where the owner of a vessel creates and finances the "charterer", controls all operations, revenues and expenditures of the vessel and receives all income.

CERTIFICATE OF INTERESTED PARTIES PURSUANT TO RULE 21.1(B)

The undersigned counsel of record for FRED S. JAMES & CO. OF TEXAS, INC., Petitioner, certifies that the following listed parties have an interest in the outcome of this case:

FRED S. JAMES & CO. OF TEXAS, INC.

FRED S. JAMES, INC.

NUMEROUS AFFILIATES BEARING THE NAME FRED S. JAMES OF (STATE), INC.

EQUILEASE CORPORATION

AFFILIATES BEARING THE NAME OF UNILEASE NO. (NUMERICAL DESIGNATION), INC.

ELTRA CORPORATION

ALLIED CORPORATION

DUNNAMIS OFFSHORE TOWING, INC.

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REFERENCE TO OPINIONS

The Opinion of the United States District Court for the Eastern District of Louisiana, March 18, 1983, is published in 568 F.Supp. 1259 (E.D.La. 1983).

The First Opinion of the United States Court of Appeals for the Fifth Circuit, September 27, 1984, is published in 742 F.2d 852 (5th Cir. 1984).

The Second Opinion of the United States Court of Appeals for the Fifth Circuit, April 1, 1985, is published in 756 F.2d 357 (5th Cir. 1985).

The En Banc Opinion of the United States Court of Appeals for the Fifth Circuit, April 25, 1986, as amended by letter dated May 5, 1986, and as amended by letter dated May 28, 1986, is published in ___ F.2d ___ (5th Cir. 1986).

JURISDICTIONAL STATEMENT

Petitioner seeks review of the Opinion and Decree of the United States Court of Appeals for the Fifth Circuit on April 25, 1986, as amended by letter dated May 5, 1986, and as amended by letter dated May 28, 1986, which reinstates Parts II, III,

IV and V of the Second Opinion, and reverses the Judgment of the trial court. No re-hearing was sought of the En Banc Opinion.

This Honorable Court has jurisdiction to entertain this Petition for Writ of Certiorari by virtue of Article III of the Constitution of the United States, 28 U.S.C. §1254 and Rule 17, et seq. of the Rules of the United States Supreme Court.

STATEMENT OF ORIGINAL JURISDICTION

Jurisdiction exists in the trial court by virtue of the Ship Mortgage Act, 46 U.S.C. §911, et seq. and the Admiralty and General Maritime Laws of the United States.

STATUTES INVOLVED

Applicable to the resolution of this matter are the following statutes:

46 U.S.C. §971. PERSONS ENTITLED TO LIEN:

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon

the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, **and it shall not be necessary to allege or prove that credit was given to the vessel.**

June 5, 1920, c.250, §30, Subsec. P, 41 Stat. 1005. (emphasis supplied)

46 U.S.C. §974. WAIVER OF RIGHT TO LIEN:

Nothing in this chapter shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or **other necessaries**, or the mortgagee, **from waiving his right to a lien**, or in the case of a preferred mortgage lien, to the preferred status of such lien, **at any time by agreement or otherwise**; and this chapter shall not be construed to affect the rules of law existing on June 5, 1920, in regard to (1) the right to proceed against the vessel

for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed in personam, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States.

June 5, 1920, c.250, §30, Subsec.S, 41 Stat. 1005. (emphasis supplied)

STATEMENT OF THE CASE

A) COURSE OF PROCEEDINGS AND DISPOSITION IN THE TRIAL COURT.

On January 19, 1981, Fred S. James & Co. of Texas, Inc. ("James") filed a Complaint against Equilease Corporation ("Equilease"), Dunnamis Offshore Towing, Inc. ("Dunnamis"), Unilease No. 13, Inc., Unilease No. 14, Inc., and Unilease No. 20, Inc. ("the Unilease Companies") and against M/V SAMSON, M/V THOR, and M/V HERCULES ("the Vessels"), in rem, for premiums due and payable for marine

insurance on the Vessels.[1] Additionally, James filed a Complaint in Intervention in the proceedings for the foreclosure of the preferred ship mortgages claiming state and maritime liens against the Vessels in rem and in personam claims against Equilease, the Unilease Companies and Dunnamis. The claim of James, based upon (a) maritime lien, (b) state lien, (c) agency (invalid demise charter), and (d) unjust enrichment, was tried before the Honorable Henry A. Mentz, Jr. commencing January 3, 1983. A Judgment was rendered by the district court on March 18, 1983, holding that: (a) the Unilease Companies were the alter-egos of Equilease; (b) the purported preferred ship mortgages were void; (c) as a practical matter, insurance falls into the class of "other necessaries". As a legal matter, however, insurance does not fall into that class[2]; and (d) the

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1. For the sake of brevity, Equilease and the Unilease Companies will be referred to as the Equilease Companies unless a separate distinction need be made.

2. 568 F.Supp. 1259 (E.D.La. 1983).

claim of James for the insurance premiums gave rise to a valid state lien under the Louisiana Civil Code.

B) COURSE OF PROCEEDINGS AND DISPOSITION IN THE APPELLATE COURT.

An appeal was filed by the Equilease Companies to the Fifth Circuit, and James, in order to protect its claims under the other three theories of recovery, filed a cross-appeal. On September 27, 1984, the Fifth Circuit rendered its decision ("the First Opinion") affirming the Judgment of the district court. A Petition for Rehearing was filed by the Equilease Companies and, on April 1, 1985, the Fifth Circuit, without further argument, rendered an opinion ("the Second Opinion") which withdrew the First Opinion and reversed the Judgment of the district court.

Granting en banc consideration, the Fifth Circuit, in a divided Opinion ("the En Banc Opinion"), unanimously held that marine insurance is a

"necessary" under the Federal Maritime Lien Act[3] ("FMLA") and thus may be given the status of a "federal maritime lien", but denied recovery to James "because it has been shown to have not relied on the credit of the vessels". The Majority Opinion was amended on May 5, 1986 and May 28, 1986 by letters from the Clerk.

STATEMENT OF FACTS

This is a claim for insurance premiums on three documented, ocean-going tugs ("the Vessels") by an insurance broker. The record will reflect that the original owner, Equilease, in order to insulate itself and the Vessels from the claims of legitimate creditors, transferred the Vessels to the Unilease Companies, three wholly-owned "shelf" corporations of Equilease, and caused the Unilease Companies to execute "preferred ship mortgages" in favor of Equilease in an amount greater than the fair market values of the Vessels. To further insulate itself,

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3. 46 U.S.C. §971 et seq.

Equilease caused the Vessels to be "bareboat chartered" to Dunnamis[4] with Equilease retaining control over the operations and management of the Vessels, and, under collateral security agreements, received all revenues from the operations of the Vessels. At the time of the execution of the mortgages and charters, Equilease knew that the Unilease Companies could not satisfy the mortgage indebtedness and that Dunnamis could not satisfy the charter hire.

Equilease persuaded James to provide specified insurance on the Vessels including hull, protection and indemnity, towage, pollution, war risk and excess coverages. After two years of operations and receipt of revenues from the Vessels, the mortgagee,

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4. The initial charter was to Solar, Inc., a company owned and controlled by James "Spec" Denning. In that Solar and Denning were judgment debtors on a similar transaction in the amount of $768,242.98 and Equilease had instituted foreclosure proceedings against Solar and Denning on another financing agreement, Equilease caused Denning to form Dunnamis and transfer the charter parties and other security agreements from Solar to Dunnamis.

Equilease, ordered Dunnamis to return the Vessels to a U.S. port in order to foreclose upon its purported "preferred ship mortgages" and re-obtained title to the Vessels, free and clear of all liens and encumbrances, at a U.S. Marshal's sale for $10,000 each.[5] The Unilease Companies and Dunnamis were left hopelessly insolvent with creditors and lienors, including James, left unpaid.

At trial, it was shown that the Unilease Companies had no substance, virtually no corporate records, no bank accounts and were totally dominated and controlled in form and substance by Equilease. As to the purported charters, the charter parties provided that "all operations, revenues and expenditures were to be approved by owner

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5. James contended that each of the Vessels had a value of approximately $3 Million. The mortgages against the Vessels were in excess of $5 Million each. There can be no question that there was collusion between mortgagor and mortgagees in the foreclosure proceeding in order that Equilease could obtain clear title to the Vessels without any payment of cash.

[Equilease] in its sole discretion".[6] Pursuant to this authority and control, Equilease approved, advanced and paid the initial operating expenses of Dunnamis by direct payment and/or advances, Equilease established the manner in which the books and records of Dunnamis would be maintained, and Equilease participated in negotiations of various contracts and charter parties for the operations of the Vessels.

Except for the insurance supplied by James, the Vessels would not have been permitted by Equilease to operate and the Vessels could not have engaged in commercial transactions. Without insurance, Equilease would not have obtained any revenues from the Vessels.

SUMMARY OF THE ARGUMENT

Petitioner suggests that the En Banc Opinion of the Fifth Circuit is contrary to statutory law, is in conflict with prior decisions of this Court and

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6. Paragraph 18 of the Bareboat Charter Parties.

with decisions of the other Circuits. If allowed to stand, the En Banc Opinion will foster and condone fraud in marine financial transactions and will generate litigation.

Rarely has a case undergone such a tortuous course through an appellate court. The First Opinion affirmed the decision of the trial court which recognized the state granted privilege for the premium of marine insurance. The Second Opinion held that the state lien was extinguished by peremption, a form of prescription that cannot be extended. In the Third and En Banc Opinion, as amended, the Fifth Circuit, overruling 100 years of precedent, unanimously recognized that marine insurance is no longer an optional contract for the sole benefit of an owner of a vessel, but "is essential to keep a vessel in commerce."[7] While recognizing that James was entitled to a lien for the premiums

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7. Equilease, et al v. M/V SAMPSON, et al, ____ F.2d ____ (5th Cir. 1986) - Appendix D, page A-68 at A-89.

that it had advanced for the insurance on the Vessels, the Majority held that James had not relied on the credit of the Vessels and, accordingly, had waived its lien.

Aside from misconstruing two sources in the record,[8] the Majority relied upon the novel legal theory that James was not entitled to a maritime lien in that the right and privilege for marine insurance had not been previously recognized by a court. If this theory was carried into practice, Miranda would not have been entitled to his warning, Bakke would not have been entitled to admission to medical school, Gideon would not have been entitled to his attorney, Reliable Transfer would not have

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8. The extract of testimony relied upon by the Majority is taken totally out of context and without reference to the substance of the witness' testimony. That single sentence extracted from one of nine (9) appeal briefs filed by Petitioner was in a section dealing solely with the fraudulent nature of the purported preferred ship mortgages on the Vessels and the term "parties" referred to the mortgagors and mortgagees. The dissenting Opinion places a proper interpretation on the lexicality of the testimony and of the brief.

been entitled to apportionment, and others would have been denied rights which had not been previously recognized by this Court.

ARGUMENT

MAY IT PLEASE THE COURT:

I.

WAIVER OF THE LIEN

The En Banc Opinion is contrary to the FMLA[9], the decisions of this Court in Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.,[10] and Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of California,[11] the decision of the First Circuit in Farrell Ocean Services v. U.S.,[12] and the decision of the Ninth Circuit in Farwest Steel Corp. v. barge SEA-SPAN 241.[13]

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9. 46 U.S.C. §971.

10. 254 U.S. 1, 41 S.Ct. 1 (1920).

11. 310 U.S. 268, 60 S.Ct. 937, 84 L.Ed. 998 (1940).

12. 681 F.2d 91 (1st Cir. 1982).

13. 769 F.2d 620 (9th Cir. 1985).

The intent and purpose of the FMLA was to simplify and clarify the rules as to maritime liens as to which there had been much confusion. The Act did away with the doctrine that when the owner of a vessel contracted in person for necessaries or was present in the port when they were ordered, it was presumed that the materialman did not intend to rely upon the credit of the vessels. In clear and unmistakable language, the FMLA provides: "it shall not be necessary to allege or prove that credit was given to the vessel".

Where the claimant furnished oil upon the order and credit of the charterer, accepted a pledge of securities and proceeds thereof, released the pledge and executed a credit agreement with the charterer, this Court, holding that the lien had not been waived, stated in Dampskibsselskabet Dannebrog v. Signal Oil and Gas Co.,[14]:

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14. 310 U.S. 268, 60 S.Ct. 937, 84 L.Ed. 998 (1940)

> ... the statute provided a series of simple and comprehensive rules. While it was said not to be intended to change the general principles of the law of maritime liens, it was intended to operate in aid of those who supply necessaries to ships and it correspondingly restricted the rights of the owners of the vessels. Any person furnishing repairs, supplies, etc., to a vessel whether foreign or domestic, 'upon the order of the owner' or 'of a person authorized by the owner', is to have a maritime lien which may be enforced by suit in rem. **It is not necessary to allege or prove that credit was given to the vessel.**[15] (emphasis added)

If the vessel owner points to conduct other than an agreement, there must be proof of affirmative actions that manifest the lien claimant's clear intention to forego the lien.

In circumstances similar to those in the present case, the First Circuit in Farrell Ocean Services v. U.S.,[16] specifically stating that the analysis of the facts by the district court was clearly erroneous, reversed the trial judge's findings that the claimant

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15. 310 U.S. 268, 272, 60 S.Ct. 937, 940, 84 L.Ed. 998 (1940).

16. 681 F.2d 91 (1st Cir. 1982).

had waived his right to a lien. In reviewing similar factual allegations to those made in this case, the First Circuit held:

> It is not enough, however, to show that the supplier relied in part on the credit of the owner's agent or the owner. See The Everosa, 93 F.2d 732, 735 (1st Cir. 1937). The party entitled to the lien must have taken affirmative actions that manifest a clear intention to forego the lien.[17]

From the record, it can be clearly shown that James did not rely upon the owners (the Unilease Companies) of the Vessels, as James had never had any knowledge of the Unilease Companies. James could not have relied solely upon the charterer in that it did not meet with Dunnamis until one year after the initial transaction and, not having any knowledge of the financial condition of Dunnamis, would not have relied solely upon the credit of Dunnamis.

On the contrary, James was induced to continue providing insurance based upon assertions by

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17. 681 F.2d 91, 94.

Equilease that, among other things, including the implication of payment by Equilease, the Vessels would be under profitable charter in Mexico and would be able to pay the insurance premiums. As stated by the Fifth Circuit in Fielder v. Bay Const. Co.[18]:

> The same reasoning is as applicable to the earnings of a dredge boat as it is to rents derived from land. One who has a lien recognized in admiralty waives it by accepting the credit of the owner. **But reliance upon the earnings of a vessel shows conclusively that the lien is not waived,** and that the creditor is unwilling to accept the liability of its owner.[19] (emphasis supplied)

A totally inconsistent ruling is to be found in Barnes v. The Kongo,[20] however, there is no explanation or reason by the Sixth Circuit to justify

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18. 5 F.2d 227 (5th Cir. 1925).

19. 5 F.2d 227, 228.

20. 174 F.2d 67 (6th Cir. 1949).

the logic that reliance upon the earnings of a vessel, her sole source of funds to pay creditors, constitutes a waiver.

There is not one scintilla of evidence which indicates that James **affirmatively** manifested an intention to forego the lien and as stated by the account executive of James, "there is no intent for us to give up anything".[21] Additionally, under cross-examination, the account executive testified that "[James] wanted to stay on the risk because there was considerable money to be made at the time out of the boats".[22] This is irrefutable evidence that James relied upon the credit of the Vessels.

By filing Notices of Liens in the Mortgage Office of the Parish of Orleans when the Vessels returned to the United States, by filing a separate

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21. Trial Testimony, pg.133. The Majority suggests that this response was solicited in direct examination by James. A reading of the transcript shows that the statement is in response to a question by the trial judge.

22. Trial Transcript, pg.158.

action against the Vessels, and by intervening in the foreclosure proceedings, James took affirmative action demonstrating its reliance upon the credit of the Vessels. It defies logical reasoning that James would waive a valuable privilege without receiving some alternative security which it did not receive.

In petitioning this Court for Certiorari, James suggests that the En Banc Opinion of the Fifth Circuit will create confusion not only within the Fifth Circuit but all Circuits and, as forewarned by the dissent, an inordinate amount of unproductive trial time will be expended in an attempt to divine the subjective thoughts of the "lienor". The En Banc decision will create litigation in an area which the commentators thought had become, "a sort of ghostly echo from the past and the presumption that the lienor relied on his lien has become all but

conclusive".[23]

II.

CLEARLY ERRONEOUS

The En Banc Opinion of the Fifth Circuit is totally contrary to the decisions of this Court in Icicle Seafoods, Inc. v. Northington,[24] Anderson v. Bessemer City,[25] Guzman v. Pichirilo,[26] McAllister v. United States[27]. Without in any way expressing that the findings of the district court were "clearly

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23. Gilmore and Black, The Law of Admiralty, Second Edition, 668; See Point Landing, Inc. v. Alabama Dry Dock, 261 F.2d 861 (5th Cir. 1958); Gulf Trading & Transportation Co. v. The Vessel HOEGH SHIELD, 658 F.2d 363 (5th Cir. 1981), cert. denied, 457 U.S. 1119 (1982); Gulf Oil Trading v. M/V CARIBE MAR, 757 F.2d 743 (5th Cir. 1985); Sasportes v. M/V SOL DE COPACABANA, 581 F.2d 1204 (5th Cir. 1978).

24. ____ U.S. _____, 106 S.Ct. 1527, 88 L.Ed.2d 224, 332 (1986).

25. 470 U.S. _____, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

26. 369 U.S. 698, 82 S.Ct. 1095, 8 L.Ed.2d 205 (1962).

27. 348 U.S. 19, 20, 75 S.Ct. 6, 7, 99 L.Ed. 20 (1954).

erroneous" and that it was "left with a definite and firm conviction that a mistake [had] been committed", the Fifth Circuit reversed the district court based upon two lines of testimony in a trial that lasted three days. If the Ninth Circuit applied a "de novo" standard of review in Icicle, then the Fifth Circuit expands the "de novo" rule one step further by reversing the finding implicit in its First Opinion that the credit of the vessel had been relied upon and that there had been no waiver.

In the decision of the trial court granting judgment on the basis of the state created lien, the finding that James had relied upon the credit of the vessel and had taken no action to constitute a waiver of its right to its privilege and lien was also implicit. Under provisions almost identical to those of the FMLA, a lien and privilege under the Louisiana Civil

Code may be implicitly or explicitly waived.[28]

By affirming the district court in the First Opinion, the Fifth Circuit, with the allegations and arguments of waiver before it, tacitly, if not explicitly, recognized that James had relied upon the credit of the vessel and had not waived the state privilege. It was not until the third time that this case had been decided by the Fifth Circuit that the defense of waiver or reliance upon the credit of the vessel was mentioned. Relying upon a two line excerpt from the record, the En Banc Majority concludes, without a finding of clearly erroneous, that the trial judge's interpretation of three days of live testimony and review of voluminous records differed from the appellate court's divination of a two line excerpt from the record.

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28. Houma Steel and Supply, Inc. v. Allied Towing Services, Inc., 468 So.2d 637 (La.App. 4th Cir. 1985); Universal Elec. Const. Co. v. Liner, 281 So.2d 830 (La.App. 1st Cir. 1973), writ denied, 283 So.2d 501 (1973).

Under Rule 52(a) of the Federal Rules of Civil Procedure, in determining whether the district court's findings are clearly erroneous, the appellate court must construe the evidence in the light most favorable to the appellee.[29] The district court, in its opinion,[30] found that, under a changing environment, "as a practical matter", insurance falls into the class of other "necessaries", but that it had no authority to overrule the Fifth and other Circuits.[31] Accordingly, no direct ruling was made upon a waiver of the lien and privilege of the FMLA. Nevertheless, the trial court found that there was reliance on the state created lien under Louisiana Civil Code Article 3237(10), implicitly finding that James had not waived its right to that lien.

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29. Walker Transportation Co. v. Neylon, 396 F.2d 558, 565 (8th Cir. 1968); North American Van Lines, Inc. v. Brown, 248 F.2d 905, 914 (8th Cir. 1957); Ente Nazionale Per L'Energia v. Baliwag Nav., 774 F.2d 648 (4th Cir. 1985).

30. 568 F.Supp. 1259 (E.D.La. 1983).

31. 568 F.Supp. 1259, 1264; Appendix A, A-17.

In initially affirming the trial court's decision, the Fifth Circuit was left with no definite and firm conviction that a mistake had been committed and tacitly recognized that there had been no waiver. The Court stated, "[h]ere, the privilege against the [V]essels secured the debt in either form."[32] Twenty (20) months later, without remand to the district court or any further evidence being introduced, the finding was reversed.[33]

As stated by the Chief Justice, "duplication of the trial judge's efforts in the Court of Appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources".[34] Already, the En Banc Opinion is fostering controversy and a diversion

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32. 742 F.2d 852, 857; Appendix B, page A-23, A-38.

33. In total reliance upon the First Opinion and the prevailing precedent, Petitioner spent exactly two lines on the waiver of the lien in a 43-page en banc brief.

34. Icicle Seafoods, Inc. v. Northington, 106 S.Ct. 1527, 1530, Supra.

of judicial recourses in the Fifth and Ninth Circuits.[35] If there is a question of fact that was left unresolved by the absence of a specific finding of the trial court, then the appropriate course of action would be a remand to the trial court for a specific finding of fact.

III.

BAREBOAT CHARTER

The En Banc Opinion is contrary to the decision of this Court in Marcardier v. Chesapeake Insurance Co.,[36] United States v. Shea,[37] Leary v. United States,[38] Reed v. United States,[39] Guzman v. Pichirilo,[40] the First Circuit's decision in Stephenson

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35. Counsel for James has been approached by attorneys in these Circuits seeking trial and appellate briefs for trial and appellate proceedings relating to the FMLA.

36. 12 U.S. (8 Cranch) 39 (1814).

37. 152 U.S. 178, 14 S.Ct. 519, 38 L.Ed. 403 (1894).

38. 81 U.S. (14 Wall.) 607, 20 L.Ed. 756 (1872).

39. 78 U.S. (11 Wall.) 591, 20 L.Ed. 220 (1871).

40. 369 U.S. 698, 82 S.Ct. 1095, 8 L.Ed. 518 (1962).

v. Star-Kist Caribe, Inc.[41] and with the decision of the Second Circuit in Hansen v. E. I. Dupont De Nemours & Company, Inc.,[42] Vitozi v. Balboa Shipping Co.,[43] and Blanco v. United States,[44]

In order to insulate itself from liability and responsibility for the operations of the vessels while retaining the control, management and, most importantly, the revenues of the vessels, Equilease devised a complex financial scheme wherein Equilease:

a) transferred the vessels to three wholly-owned shelf corporations (the Unilease companies) which were totally dominated and controlled by Equilease;

b) created purported, but, in actuality, fictitious preferred ship mortgages in its favor, the

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41. 598 F.2d 676 (1st Cir. 1979).

42. 33 F.2d 94, cert. denied 280 U.S. 589, 50 S.Ct. 37, 79 L.Ed 638 (1929).

43. 163 F.2d 286 (1st Cir. 1947).

44. 775 F.2d 53 (2nd Cir. 1985).

obligations under which the Unilease Companies could not repay;[45] and

c) caused the Unilease Companies to transfer the vessels by "Bareboat Charter Parties" to an insolvent corporation (Solar).

This Court has previously recognized that a "bareboat" or "demise" charter is "tantamount to, though just short of, an outright transfer of ownership".[46] This decision has been interpreted to mean that to be a true demise charter, the agreement must be watertight, without any intrusion of control by the owner into the management and/or operations of the vessel, either in form or substance. With

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45. The recordation of the "preferred ship mortgages" had the desired effect in that the other creditors of the Vessels thought their liens to be inferior to the mortgages and did not have the legal resources to contest the validity. It was not until the trial of this matter that the mortgages were shown to be invalid. Nevertheless, Equilease re-obtained title to the Vessels based upon foreclosures of the fallacious "preferred ship mortgages".

46. Guzman v. Pichirilo, 369 U.S. 698, 699, 82 S.Ct. 1095, 1096.

respect to the elements of intrusions in this case, it was shown at trial that:

a) Equilease caused the original charterer (Solar) to create a new corporation and transfer the charter parties to Dunnamis;

b) Dunnamis, the charterer, was capitalized in whole or in part by Equilease;

c) Equilease approved, advanced and paid the initial operating expenses of Dunnamis and also established the manner in which the books and records of Dunnamis would be maintained;

d) Equilease approved the selection of the agent to market the vessels, retained the right to approve all contracts, entered into direct negotiations involving the terms, conditions and hire of charter parties and towage agreements between Dunnamis and third parties;

e) The charter parties provided that "all operations, revenues and expenditures shall be approved by owner (Equilease) in its sole discretion";

f) Under an assignment and security agreement, all revenues to be derived from the vessels were assigned to Equilease;

g) Equilease required Dunnamis to constitute and appoint Equilease to be its true and lawful attorney-in-fact with full and irrevocable power and authority.

h) Treating Dunnamis as its own operating subsidiary, Equilease required Dunnamis:

   i) to provide monthly reports of all revenues and expenses;

   ii) to forecast revenues and expenses for the coming month with quarterly reports and projections of revenues and expenses for the coming quarter; and

   iii) to submit an analysis of any deviation of the projections for the prior quarter.

As stated by this Court:

> Thus, assuming arguendo, a demise charter party would isolate the owner from liability, the owner has the burden of showing such a charter. This burden is heavy, for Courts are reluctant to find a demise when the dealings between the parties are consistent with any lesser relationship.[47]

The existence of only one of the above indicia of ownership should be sufficient to defeat the finding of a valid charter party which would enable the owner to insulate itself from the liabilities and responsibilities of the vessel.

It is suggested that the retention of control and management of the Vessels by their true owner is not "tantamount to, though just short of, an outright transfer of ownership"[48]. To permit an operating agent to be clothed in the garments of a bareboat charterer or to permit a vessel to sail under false flags of ownership, mortgage and charter in order to insulate the true owner from liabilities would

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47. Guzman v. Pichirilo, 369 U.S. 698, 82 S.Ct. 1095, 1097.

48. Guzman v. Pichirilo, 369 U.S. 698, 82 S.Ct. 1095, 1096.

foster fraud, deceit and chicanery in marine transactions.

The form of the charter parties was barnacled with security agreements, powers of attorney and assignments. The substance of the charter parties was a sieve through which the control, management, and operations of the Vessels by the true owner freely flowed. The form of the documents and the substance of the transaction clearly and completely indicate that there was no complete surrender of management, custody and control to the charterer and that the charter parties were executed to contrive a scheme to shield the true owner from the responsibilities and liabilities of the Vessels.

CONCLUSION

Not since this Court handed down its rulings in Dampskibsselskabet,[49] and Guzman,[50] has it

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49. 310 U.S. 268, 60 S.Ct. 937, 84 L.Ed. 998 (1940).

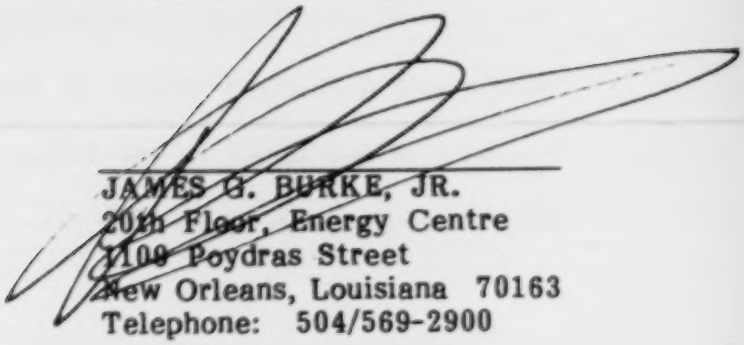
50. 369 U.S. 698, 82 S.Ct. 1095, 8 L.Ed. 518 (1962).

reviewed and commented upon the FMLA and the elements of a valid charter. This petition provides this Court with the opportunity to re-chart the prevailing waters of admiralty law in areas of ownership, mortgage, lien and charter. Without such pilotage, the trial and appellate courts will be faced with uncertainty and unnecessary litigation due to the confusing and conflicting opinions between and within the Circuits.

Additionally, it is suggested that this petition provides a factual situation wherein this Court may establish definitive guidelines for what is "clearly erroneous" for the appellate courts deciding the subjective intent of an individual and interpreting unambiguous language of a written contract.

It is suggested that in granting certiorari, this Court would be given the opportunity to stem the tide of litigation that will congest the trial and appellate dockets by re-establishing the channel markers and buoys for the guidance of the marine industry and admiralty bar.

Respectfully submitted,



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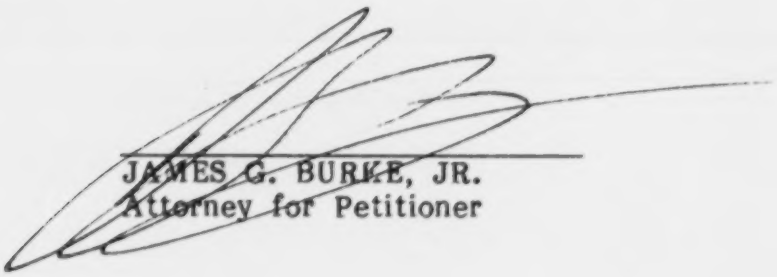
Attorneys for Petitioner

CERTIFICATE

I HEREBY CERTIFY that I am a member of the Bar of this Court representing the petitioner herein and that three copies of the above petition for writ of certiorari to the United States Supreme Court were served upon:

PHILIP A. FRANCO, ESQ.
Adams & Reese
4500 One Shell Square
New Orleans, Louisiana 70139

counsel for the respondent, first class postage prepaid, this 14th day of July, 1986.



JAMES G. BURKE, JR.
Attorney for Petitioner

86-58

NO.

Supreme Court, U.S.
FILED
JUL 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

FRED S. JAMES & CO. OF TEXAS, INC.
Petitioner

VERSUS

EQUILEASE CORPORATION,
M/V SAMSON, M/V THOR, and M/V HERCULES, ETC.
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

EQUILEASE CORPORATION

V.

M/V SAMSON, etc., et al.

FRED S. JAMES & CO. OF TEXAS, INC.

V.

EQUILEASE CORPORATION, et al

Civ. A. Nos. 81-112, 81-234.

United States District Court,
E.D. Louisiana,
Section "I".

March 18, 1983.

MENTZ, District Judge.

In C.A. 81-234, Fred S. James & Co. of Texas, Inc. ("James") filed a complaint against Equilease Corporation ("Equilease"), Dunnamis Offshore Towing, Inc., ("Dunnamis"), Unilease 13, Inc., Unilease 14, Inc., and Unilease 20, Inc., in personam, and against the

M/V SAMSON, the M/V THOR, and the M/V HERCULES, in rem, both for the insurance premiums due and payable on the vessels in the amount of $231,621.00 and for interest, costs and attorneys fees. James' suit was originally transferred to this section for consolidation with Civil Actions Nos. 80-4785 and 81-112. The latter two cases, except for James' intervention in 81-112, were subsequently dismissed. The Court conducted a non-jury trial in C.A. 81-234 on January 3, 1983. After the trial, the Court took the matter under submission.[1] Having reviewed the evidence, the memoranda of counsel, and the applicable law, the Court now makes the following findings of fact and conclusions of law.

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1. On January 26, 1983, this Court signed an ex parte order dismissing Dunnamis from the case without prejudice. Since signing the order, the Court has learned that Equilease strenuously objects to the dismissal. Because of this objection and because the order was considered and signed ex parte, the Court hereby vacates that order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Equilease, a wholly-owned subsidiary of Eltra Corporation ("Eltra"), engaged in financing through both mortgages and leases. James, a national insurance broker, is a principal supplier of marine insurance. James' own offices are located in Texas. It has affiliated offices, however, with Fred S. James & Co. of New York in New York.

In 1974, Equilease agreed to provide interim construction financing to the owner and builder of the tugs M/V SAMSON, M/V THOR, and M/V HERCULES. Equilease foreclosed upon and became the owner of these three vessels in 1977, after a default by the shipyard and the owner. At that time, however, the boats had not been completed but were still sitting in the shipyard at Lockport, Louisiana. Equilease did not decide to complete the three tugs until 1978. The remaining work was then done at the Avondale Shipyard in New Orleans.

After the tugs were completed, Equilease transferred the title of each vessel to a separate "shelf"

corporation. One tug was transferred to Unilease 13, Inc.; another to Unilease 14, Inc.; and another to Unilease 20, Inc. In return, each Unilease corporation granted a preferred first mortgage to Equilease. These mortgages covered the cost of each vessel, the fraud losses sustained at the original shipyard, the cost of completion, plus other expenses. The following facts about the Unilease corporations are relevant to the resolution of this dispute. Each was capitalized at the nominal figure of $200 and filed a consolidated federal income tax return with Equilease. The officers and directors of each corporation were employees of Equilease. Finally, at all relevant times, Equilease remained the sole stockholder of each corporation and furnished each with the same attorney.

At trial, Mr. Hal B. Parkerson, Vice President and General Counsel of Equilease and the three Unilease companies, described Equilease's general activities. He stated that in structuring transactions during the period relevant to this suit Equilease

generally had to comply with the requirements of companies that lent Equilease money under bond and financing arrangements. When asked about the business purpose of Equilease placing the tugs in separate Unilease corporations, rather than retaining ownership, Parkerson offered the following explanation:

(1) Each Unilease corporation was the type of asset Equilease would get credit on under a lending agreement. He referred specifically to the preferred first mortgage granted by each Unilease corporation to Equilease in return for the transfer of the vessel.

(2) The preferred first mortgage was convenient from the standpoint of a possible sale to a third party. To illustrate, Parkerson mentioned discussions between Equilease and Manufacturers Hanover Bank of New York regarding the possibility of purchasing the

three Unilease mortgages on a recourse basis.

(3) The creation of the Unilease "shelf" corporations enabled Equilease to avoid possible exposure for tort losses.

(4) By having the Unilease corporations as wholly-owned subsidiaries and by filing a consolidated tax return, Equilease retained the investment tax credit, as well as the depreciation on the three vessels.

In 1978, while negotiating for the completion of the three tugs, Equilease entered into a bareboat charter agreement for all three tugs with Solar Fleet, Inc., a company whose sole shareholder and president was Mr. Speck Denning. A year later, Solar's interest in the agreement was transferred to or inherited by Dunnamis, another of Denning's wholly-owned corporations. Equilease decided to enter into this agreement and to maintain it even though the company had previously had financial problems with

Denning, including having to bring a suit against him, which the company won.

Parkerson testified at trial that the charter agreement contained a provision requiring Dunnamis to purchase insurance. That provision brought James into the picture. Knowing that its New York affiliate handled the Eltra account, James was very interested in retaining the business generated by the Eltra-Equilease companies. To put Denning and Dunnamis in an operating position, Equilease advanced $200,000 in working capital but did not require monthly payments for the first several months. Denning took out the necessary insurance with James, at a cost of over $200,000. Although $184,000 of the first year's premiums were still unpaid at the end of the first policy year, James did not bring suit against Dunnamis. Instead, in late September or early October of 1980, James financed the premiums with Borg-Warner Finance Company ("Borg-Warner"). When the financing took place, for $215,000, that sum consisted mostly of earned premiums for the

1979-1980 premium year, so that James had to endorse the note. The financing agreement itself involved only Dunnamis and James.

Denning worked the three vessels in the Gulf for several months but did not generate sufficient funds to pay Equilease under the bareboat charter. To ensure full use of the vessels, Dunnamis executed a contract with Newpark Marine Services ("Newpark") under which Newpark would receive a 10% commission for its services in obtaining full use of the three boats. Shortly thereafter a dispute arose between Dunnamis and Newpark over whether Newpark or Dunnamis should pay the fuel bill. Following this dispute, relations between Dunnamis and Newpark continued to deteriorate until they were terminated. After the Newpark arrangement was terminated, Denning thought he could obtain a better contract from Pemex, the Mexican national oil company. Toward this end, Denning apparently set out with the three vessels for Tampico. Owing to various misunderstandings, however, Denning brought the

vessels to Panama, where they were finally brought back into the custody of Equilease-Unilease. Parkerson stated that he had made a trip to Tampico, where he ascertained that Denning had misrepresented the nature of the Mexican contract to Equilease. Only at that point did Parkerson conclude that Equilease-Unilease could no longer rely on Denning.

While neither Equilease nor Unilease had control over the purchase of insurance from James, and while James was responsible for Denning's return from Mexico to sign the Borg-Warner finance agreement, the court finds that the only reason James cooperated with Denning and Dunnamis was because James reasonably believed that Equilease was Denning's firm financial backer. This finding is strongly supported by the trial testimony of Mr. William K. Hargrove, an expert in marine insurance who was employed by James during the period relevant to this dispute. Hargrove testified that, from the beginning, when James originally decided

to issue Dunnamis a policy, James' understanding was that Dunnamis would pay the premiums but that the money would be coming from Equilease.

On Dunnamis' 1979-1980 policy, the named assureds were "Dunnamis and Equilease and Unilease." Both Equilease and Unilease were listed as owners. On the 1980-81 policy, however, when Dunnamis' receivables were being assigned to Equilease, only Equilease was named as owner. According to Hargrove, instructions for this latter policy were given by Mr. Barranko, Risk Manager of Eltra. All correspondence went directly to Denning, with copies going to Parkerson and to Mr. Harrigan, Vice President of Equilease. The premiums on this policy were paid in part by Dunnamis. Hargrove testified that he thought Equilease was advancing money to Dunnamis to pay the bills, but none of the insurance premiums were ever paid by Equilease itself. After financial problems developed Denning advised Hargrove that Equilease was "taking over" and would pay the Dunnamis premiums. Although Denning

received "favorite son" treatment from Equilease throughout this period, this treatment did not make him the agent of Equilease.

Hargrove emphasized that, when the boats left for Mexico, James decided to stay on the risk only after talking to Parkerson. When asked, however, whether Parkerson had agreed to pay the insurance, Hargrove said "no."[2] Parkerson's only relevant comment appears to have been that "Equilease would be taking over" from Dunnamis and Denning. There

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2. See Pre-Trial Order Statement of Uncontested Facts (7)(c)(15):

> At no time did any officer, director, employee or agent of Equilease Corporation, its parent Eltra Corporation, or Unilease 13, Inc., Unilease No. 14, Inc. or Unilease 20, Inc. purchase the aforementioned insurance policies, procure the aformentioned policies, order the aforementioned insurance policies, request the issuance of the binders of the aforementioned insurance policies, or otherwise contract for the insurance mentioned above.

is a contention that Exhibit 22, signed by "Speck", stating that "Equilease is taking over," is also important. Since this communication came from Denning, however, rather than from any agent of Equilease, the Court disagrees. Hargrove stated that, after the boats went to Mexico, Barranko asked whether there was coverage on the "breach of warranty" portion of the policy. Hargrove said Barranko was told the coverage was in effect and applicable to boats being taken out of the country. Hargrove stated he did not ask Equilease or Eltra to guarantee the Borg-Warner note or the account.

The testimony of Mr. Lionel "Pappy" Ruckstul, former president of Newpark, demonstrates the necessity for vessels having the proper insurance. Ruckstul stated that Newpark would not accept the three vessels into its fleet without certain insurance coverages. These coverages were required, in turn, by agreements Newpark had with its own customers. Ruckstul explained that a company such as Newpark will not be invited to bid on a job unless the company

is on an approved list indicating the company has all of the required insurance. Ruckstul's testimony regarding the need vessels have for insurance was corroborated by Mr. Robert W. Wells Breeden, Senior Vice President for Caroon & Black Insurance Agency, who stated that 99% of the boats operating offshore carry full insurance as a necessary expense of operating. Also of note in this connection is the testimony of Parkerson, which reveals Equilease required all of its affiliated companies to carry adequate insurance and would not do business with any company that failed to carry adequate insurance.

MARITIME LIEN

[1] The Louisiana Civil Code, art. 3237, provides as follows:

> The following debts are privileged on the price of ships and other vessels, in the order in which they are placed:
>
> > (10) The premiums due for insurance made on the vessel, tackle, and apparel, and on the armament and equipment of the ship.

> The term of prescription of privileges against ships, steamboats, and other vessels shall be 6 months.

Since the present suit was filed on January 19, 1981, and the last acknowledgement of this account occurred in late September or early October of 1980, when the Borg-Warner instalment contract was negotiated by Dunnamis and James, the account had not prescribed at the time this suit was filed. The Court therefore finds that the suit itself was filed within the six-month prescription period. See La.C.C. arts. 520 and 3535 (Prescription "only ceases from the time when there has been an amount acknowledged, a note or bond given, or a suit instituted." (emphasis added) Article 3237 of the Louisiana Civil Code refers to the six-month period as being one of prescription rather than peremption as contended by Equilease. The case of In Re Safticraft Corporation, 255 F.Supp. 797 (W.D.La.), Affirmed 376 F.2d 855 (5th Cir.1967), applied Article 3518, contained in the chapter on Prescription, in holding that an interruption took place. This shows

the Court considered the six-month period contained in Article 3237 to be one of prescription.

[2] James urges this Court to find that for the unpaid insurance premiums James is entitled to a privilege on the vessels M/V SAMSON, M/V THOR, and M/V HERCULES under Louisiana law and to a maritime lien on those vessels under federal law. The Court agrees that James has a privilege on the three vessels, see L.C.C. art 3237, and that that privilege is enforceable by this Court. Grow v. The Loraine K, 310 F.2d 547 (6th Cir.1962); see generally Comment, Developments in the Law of Maritime Liens, 45 Tul.L.Rev. 574, 598-604 (1971). The Court cannot agree, however, that James has a federal maritime lien on the vessels.

[3],[4] The Federal Maritime Lien Act provides, in pertinent part:

> Any person furnishing repairs, supplies, towage or use of drydock or marine railway, or other necessaries, to any vessel, whether it be foreign or domestic,

> upon the order of the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

46 U.S.C. §971 (emphasis added). As James rightly points out, the jurisprudence interpreting this section of the Act requires that the phrase "other necessaries" be given a broad meaning. J. Ray McDermott & Co. v. The Offshore-Menhaden Co., 262 F.2d 523 (5th Cir.1959) The phrase does not refer to something that is absolutely indispensable. Abjubita v. S/S Peik, 428 F.2d 1345 (5th Cir.1970). It refers, instead, to supplies and services that are "reasonably needed in [a] ship's business." Walker-Skageth Food Stores, Inc. v. The Bavois, 43 F.Supp. 109, 110 (S.D.N.Y.1942). As the testimony of several witnesses reveals, insurance is something every vessel today needs just to carry on its normal business. Messrs. Breeden, Hargrove, Parkerson and Ruckstul all agreed on this point. The Court here thus has

no doubt that, as a practical matter, insurance falls into the class of "other necessaries". As a legal matter, however, insurance does not fall into that class.

More than eighty years ago, in a case that is still good law, Learned v. Brown, 94 F. 876 (5th Cir.1899), the Fifth Circuit held that a federal maritime lien cannot be predicated on unpaid insurance premiums. Since then, other courts have reached the same conclusion. The Sixth Circuit, for example, recently stated that "Neither admiralty law nor the Federal Maritime Lien Act ... provide[s] for a lien for unpaid insurance premiums." Grow, supra at 549. Similarly, in West of England Shipowners v. Patrick S.S. Co., 491 F.Supp. 539, 544 (D.Mass.1980), the court stated that "the case law is clear that claims of an insurer for unpaid insurance premiums do not give rise to a maritime lien." This Court is not in a position to ignore or reject these precedents. More specifically, it has no authority to overturn Brown. If that decision is to be overturned, it will

have to be overturned by the Fifth Circuit. The Court finds, therefore, that James is entitled to a lien for all unpaid premiums owed to the company, but that the lien to which James is entitled arises only under state law.

THE UNILEASE COMPANIES

[5-7] According to well-established jurisprudence, a finding of control or domination of a corporation by an individual or a corporate entity in the use of the corporate fiction is a prerequisite to the application of the alter ego theory of liability. Noe v. Roussel, 310 So.2d 806 (La.1975); Panther Pumps & Equipment Co., Inc. v. Hydrocraft, Inc., 424 F.Supp. 815 (N.D.Ill.1976). The fiction of corporate entity will be disregarded, however, whenever justice so requires. In re Bowen Transport, Inc., 551 F.2d 171 (7th Cir.1977). The corporate veil should always be pierced, moreoever, whenever the separate entity theory leads to an absurdity or whenever persons involved in a corporation seek to use the legal fiction to immunize themselves from the consequences of

their fraud or illegality. Haynes v. Champagne Title Corp., 228 F.Supp. 157 (E.D.La.1964); Houston Oil Field Material Company v. Stuard, 406 F.2d 1052 (5th Cir.1969).

[8] In the present case, all of the evidence reveals that the three Unilease corporations were the "alter ego" of Equilease. This is shown by the following. Under the Ship Mortgage Act, preferred status is given if, among other things, an affidavit is filed stating that the mortgage is made in good faith and without any design to hinder, delay, or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel. 46 U.S.C. §922(a)(3). That requirement was not satisfied in this case. Here sole control of the Unilease corporations was held and exercised by Equilease. Equilease owned all of the Unilease stock, furnished all of the Unilease directors and officers, all of the companies' financing, and all of its salaries and legal counsel. The only business the Unilease corporations ever had was that given to it by Equilease. Finally,

the Unilease corporations filed a consoldiated federal tax return with Equilease. All things considered, then, Equilease appears to have enjoyed total control and supervision. Under these circumstances, the "good faith affidavit" of the Unilease mortgagors was a sham. Consequently, the subject mortgage must be held void as to James.

Although the Equilease-Unilease arrangement was not of itself illegal, third parties must be protected from suffering financial loss caused by that arrangement. Had Equilease continued to hold title to the three tugboats, James undoubtedly would have had the first lien on all three vessels. Hence Equilease cannot put itself ahead of other legitimate creditors by transferring the boats to three controlled corporations, and then taking a preferred first mortgage on the vessels, the amount thereof representing capitalization of its investment in those vessels.

LIABILITY OF DUNNAMIS AND/OR EQUILEASE

There is no question but that Dunnamis is liable for the debt here sued on. Although some evidence exists that Equilease made a verbal commitment to pay this debt, such commitments are not binding under Louisiana law. The Louisiana Civil Code is quite explicit on this point. It states: "[P]arole evidence shall not be received ... (3) to prove any promise to pay the debt of a third person." La.C.C. art. 2278.

In light of the foregoing, the Court hereby VACATES the Order Dismissing Dunnamis without prejudice, signed on January 26, 1983, and enters judgment as follows:

(1) Granting Fred S. James & Co. of Texas, Inc., judgment in personam against Dunnamis Offshore Towing, Inc. and in rem against the M/V THOR, SAMSON and HERCULES, for the amount sued upon, plus legal interest from judicial demand, together with 10% of principal and

interest as attorneys' fees and for all costs of these proceedings, subject to the submission by James within 30 days of a statement showing the proportion of premiums paid on each vessel.

(2) Voiding the preferred first mortgages of the Equilease Corporation, Unilease 13, Inc., Unilease 14, Inc., and Unilease 20, Inc., insofar as the claims of Fred S. James & Co. of Texas, Inc. are concerned.

(3) Dismissing the intervention of Fred S. James & Co. of Texas, Inc., in Civil Action No. 81-112 as being duplicative of the complaint in Civil Action No. 81-234.

APPENDIX B

EQUILEASE CORPORATION,
Plaintiff-Appellant
Cross-Appellee,

v.

M/V SAMPSON, Etc., et al.,
Defendants-Appellants,
Cross-Appellees,

v.

FRED S. JAMES & CO., etc.,
Intervenor-Appellee,
Cross-Appellant.

FRED S. JAMES & CO., etc.,
Plaintiff-Appellee
Cross-Appellant,

v.

EQUILEASE CORP., et al.,
Defendants-Appellants,
Cross-Appellees.

No. 83-3298.

United States Court of Appeals,
Fifth Circuit.

Sept. 27, 1984.

Before REAVLEY, JOHNSON and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Equilease Corporation and the three Unilease Corporations (collectively "Equilease" unless otherwise noted) appeal the district court's holding, 568 F.Supp. 1259 (D.La. 1983) that Fred S. James Company ("James"), an insurance agency, has an enforceable state privilege for unpaid insurance premiums against three vessels owned by Equilease and that the privilege had not prescribed. James cross-appeals, but because we affirm the district court, we need not reach the issues James raises on cross-appeal.

I.

Equilease is a financial corporation that in 1974 provided interim construction financing for three vessels, later named the M/V SAMPSON, the M/V THOR, and the M/V HERCULES. In 1977 the owner of the vessels defaulted on its loan, leaving Equilease as involuntary owner of the uncompleted vessels.

After determining that selling the hulls would not be economical, in 1978 Equilease moved the vessels to another shipyard for completion at its own expense. Upon completion, Equilease transferred title to each of the vessels to a separate, wholly owned, nominally capitalized Unilease "shelf" corporation, taking a preferred first mortgage from each corporation in the amount of construction cost and other expenses.

Having no experience in the operation of vessels, Equilease issued a bareboat charter on each of the vessels to Solar Fleet, Inc., a company wholly owned by James S. Denning. Denning later transferred the charters to Dunnamis Offshore Towing, Inc. ("Dunnamis"), another corporation he owned. The Equilease charter required the charter party to purchase insurance for each of the vessels. Dunnamis procured this required insurance from Fred S. James & Company.

At the end of the first year of operation, $184,000 of the insurance premiums remained unpaid.

Dunnamis informed James that the three vessels soon would begin operating in Mexico under a lucrative five year charter agreement. Relying on this information, James decided to provide insurance for the three vessels for another year rather than cancelling the policy and bringing suit for the unpaid premiums. James paid the overdue premiums to the insurers. Then, as James explains, "to clear up the books from an accounting standpoint", James arranged for a financing company, Borg-Warner Insurance Finance Corporation ("Borg-Warner") to pay the outstanding overdue premiums. James arranged for Borg-Warner to accept a note executed by Dunnamis and then prepared the documents necessary to effect the transaction. Borg-Warner had James guarantee the Dunnamis note so that James, rather than Borg-Warner, bore the risk of non-payment by Dunnamis. When James recieved funds from Borg-Warner, it made appropriate bookkeeping entries, crediting Dunnamis' overdue account in full.

During the second year of their relationship, Equilease became concerned about the manner in which Dunnamis was operating its vessels. Dunnamis already had defaulted on the charter agreement, and the charter in Mexico had not worked out as expected. Equilease, with some difficulty, finally located its vessels in Panama. It brought the vessels back to the United States at its own expense, then seized them and instituted proceedings in federal district court to foreclose on its preferred mortgages.

By that time Dunnamis evidently also had defaulted on its insurance note payments to Borg-Warner. James, as guarantor, feared that it might have to pay Borg-Warner, and therefore intervened in the foreclosure proceedings, claiming a state privilege[1] and maritime lien against the vessels for

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1. The Louisiana Civil Code provides that a debtor's property is the common pledge of his creditors, and in the absence of cause for preference, the creditors rank equally. La.Civil Code art. 3183 (West 1952). One cause of preference is the privilege, which arises by operation of law, and allows a creditor preferred status over other creditors because

unpaid insurance premiums. James also filed a separate but substantially similar lawsuit against Equilease and Dunnamis in personam, and against the three vessels in rem. The district court consolidated the actions.

After hearing the evidence, the court held that James has a state privilege against the vessels for the amount of the unpaid insurance premiums, and that because Dunnamis acknowledged the debt within six months of the filing of the lawsuit, the applicable six-month prescriptive, or limitations period had not lapsed. It refused, however, to create a federal statutory maritime lien in favor of James, relying on this court's decision in Learned v. Brown, 94 F. 876 (5th Cir. 1899). It then invalidated the preferred mortgage on the basis that the three Unilease corporations were "shams" and "alter egos" of Equilease against the vessels, thus reducing Equilease to the status of a general creditor against the

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(cont.)
of the nature of the debt owed him. La.Civil Code arts. 3184 and 3186.

vessels.[2] It further held that Dunnamis was not an agent of Equilease with the power to obligate Equilease to pay the premiums. It entered judgment in favor of James in rem and against the vessels, and in personam against Dunnamis, who does not appeal.

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2. The district court's rationale on this issue leads to confusing and contradictory conclusions, or so it seems to us. If the district court meant that the Unilease corporations are "shams" and "alter egos" of Equilease, then Equilease is the owner of the vessels and not the mortgagee. It therefore has no creditor's claim against ships it in fact owns. The district court, however, indicated that it was invalidating the mortgages "as to James", and referred to Equilease as the "legitimate creditor", but one who could not advance its claims over other general creditors. We are thankful that we are not asked to resolve this conundrum on appeal, and that its resolution is not relevant to the issues we must decide. Whether the district court pierced the corporate veil between Equilease and the three Unilease corporations generally, or whether it simply invalidated the "preferred" status of the ship mortgage, Equilease's strategy on appeal evidently is to reduce James to the status of a general creditor, so that its earlier mortgage will have priority over James' lien. Equilease does not appeal the district court's holding that the Unilease corporations are "shams" or "alter egos".

II.

The parties raise several issues on appeal and cross-appeal, including whether James holds a privilege for unpaid insurance premiums, whether the privilege survived execution of the note to Borg-Warner, and whether the privilege prescribed. Because we resolve these issues in favor of James, we need not address the other issues raised.

A.

[1] First, we reject Equilease's argument that James, as an insurance agency and not an insurer, cannot enforce the debt for unpaid insurance premiums secured by the privilege. Louisiana courts apply a rule "that the insurer, not the agent, is the proper party to sue for premiums due on an insurance policy unless the agent has paid the [insurance] company for the premiums or has become personally liable therefor, in which case the agent can sue for the premiums in his own name". Cypress Insurance Agency, Inc. v. Aqua Blast Service Co., 347 So.2d 1198, 1199 (La.App. 1977) (emphasis added). See

also, Perrin v. Saunders, 198 So.2d 555, 557 (La.App. 1967); Page v. Marcel, 44 So.2d 363, 368 (La.App. 1950). James actually paid the insurance premiums to the insurers, and therefore has a right of action for the unpaid premiums against the insureds, and, pursuant to Article 3237 of the Louisiana Civil Code, also against the vessels.[3]

B.

Article 3237 provides that:

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3. Equilease vigorously argues that before James can claim a privilege for unpaid insurance premiums it must prove that it, as an insurance agent, was subrogated to the legal rights of the insurers who actually provided the insurance and to whom the premiums were due. Louisiana law, however, does not require proof of legal subrogation, but requires only that an agent prove something more than that it sold and delivered the policies to the insured. Perrin v. Saunders, 198 So.2d at 557. Any "connection or relationship" between the defendant insured and the plaintiff will suffice. Id. The agent's actual payment of or liability for premiums is such a connection. Cypress Insurance Agency, 347 So.2d at 1199. Thus, we need not discuss Equilease's subrogation argument.

> The following debts are privileged on the price of ships and other vessels, in the order in which they are placed:
>
> . . .
>
> (10) The premiums due for insurance made on the vessel, tackle, and apparel, and on the armament and equipment of the ship.
>
> . . .
>
> The term of prescription of privileges against ships, steamboats and other vessels shall be six months.

[2,3] The lien created by Article 3237 is stricti juris; it cannot be extended by implication or analogy. La.Civ.Code Ann. art. 3185 (West 1952); P.B.C. Systems, Inc. v. L.A.D. Construction Co., 428 So.2d 984 (La.App. 1983); Pelican State Associates, Inc. v. Winder, 208 So.2d 355 (La.App. 1968), aff'd 253 La. 697, 219 So.2d 500 (1969). The debt Dunnamis owed to James for unpaid insurance premiums, however, clearly falls within Article 3237. That James guaranteed Dunnamis' note payable to Borg-Warner in the amount of unpaid insurance premiums, in exchange for Borg-Warner's payment of that amount to James, does not change the nature of the

underlying obligation flowing from Dunnamis to James.

[4,5] Whether the transaction among James, Borg-Warner, and Dunnamis extinguished James' privilege for unpaid insurance premiums and created another type of debt - specifically, a debt to Borg-Warner on a note - depends on whether the parties intended a novation of the debt secured by the privilege. Farmers' National Bank of Lebanon v. Belle Alliance Co., 142 La. 538, 77 So. 144 (1917). A "novation is a contract consisting of two stipulations; one to extinguish an existing obligation, the other to substitute a new one in its place". La.Civ.Code art. 2185. Novation may result from substitution of debtors or, as in this case, substitution of creditors. E.g., Sterlington Bank v. Terzia Lumber & Hardware, Inc., 146 So.2d 233, 235 (La.App. 1962). Louisiana law, however, never presumes that parties intended to create a novation of an existing debt, but requires clear proof of intent to discharge the original debt and substitute a new one in its place.

Id. at 235. Cf. La.Civ.Code art. 2192 (novation requires expression of intent by creditor to discharge original debt). The intent to create a novation may be expressly declared, or may be tacit and implied from the nature of the contract or from external circumstances. Placid Oil Co. v. Taylor, 325 So.2d 313 (La.App. 1976).

[6] A change in the form of a debt does not by itself create a novation. Executing a note to renew an old debt, for example, "does not novate the original debt or destroy the privilege securing the same". Farmer's National Bank of Lebanon, 142 La. at 538, 77 So. at 144. See also, Wilson v. Clerk of Court, 148 So.2d 775, 777 (La. App. 1963). Cf. In Re: Red River Line, 115 La. 867, 40 So. 250, 252 (1905) (parties conceded note received "as cash"). Similarly, acceptance of subsequently dishonored checks does not destroy the privilege underlying the debt the debtor gave the checks to satisfy. Sterlington Bank, 146 So.2d at 236.

The transactions analyzed in Insured Lloyds Insurance Co. v. Woodle, 248 So.2d 862, 864 (La.App. 1971), although involving automobile insurance, parallel the facts of this case. The insured in Woodle procured automobile insurance from the plaintiff. He obtained a loan from an independent finance company to pay the premium, giving the finance company a downpayment and a note for the balance. The finance company then transferred the downpayment and sold the insured's note to the insurer. Later the insurer brought suit against the insured for unpaid premiums, and the insured moved to dismiss for no cause of action on the basis that the premiums had been paid. The insured argued that the only cause of action the insurer might have flowed from its status as a holder of the note. The Louisiana Court of Appeals held that the downpayment and note transferred by the finance company to the insurer did not extinguish the debt owed directly by the insured to the insurer unless the parties intended a novation. Id. at 864-65.

Wilson v. Clerk of Court, 148 So.2d 775 (La.App. 1963) also provides insight into this case. In Wilson a supplier of building materials took a note from its debtor, a contractor, in the amount of a debt secured by liens on the construction. The supplier then made appropriate bookkeeping entries, crediting the contractor's open account and debiting a note account. The contractor later brought a mandamus action seeking cancellations of the supplier's materialmen's lien. In recognizing the validity of the lien, the Louisiana Court of Appeals failed to find any consideration for the note flowing to the supplier. It held that the supplier's booking debits and credits, reflecting receipt of the note, did not prove that the parties intended to create a novation, especially in the light of the surrounding circumstances suggesting that the creditor, by accepting the note, did not intend to relinquish any previously existing rights. Id. at 777.

[7] The record in this case does not contain evidence sufficient to prove that the parties intended

to create a novation or that James intended to extinguish the original debt Dunnamis owed for insurance on the three Equilease vessels. According to Insured Lloyds, James' guaranty or purchase of a note does not, by itself, prove that James intended to create a novation, and according to Wilson, James' bookkeeping entries also are insufficient. The record contains no other evidence that James intended to relinquish any rights, and the manner in which the parties structured the Borg-Warner transaction indicates that the parties intended the existing obligation to continue.

James sought funds to pay the insurers for Dunnamis' overdue premiums. Dunnamis could not provide those funds. James therefore arranged to procure them from Borg-Warner. Although Borg-Warner took a promissory note from Dunnamis, and not from James, it relied on the credit of James and not that of Dunnamis. It did not even require collateral from Dunnamis, but instead required James to guarantee the note. James, then, bore the risk

of default by Dunnamis. When Dunnamis defaulted, it still owed James a debt for insurance premiums that were outstanding before the Borg-Warner transaction. Considering all the facts of this case, James' change in status from an acccount creditor to a creditor on a note is immaterial to its status as holder of a privilege. Here, the privilege against the vessels secured the debt in either form. The remaining question, then, is whether the privilege became extinct because it prescribed. La.Civ.Code art. 3277. We hold that it did not.

III.

A.

Again, we must first reject Equilease's argument, which is that, because Article 3237 itself contains a limitations period, that period is one of peremption and not of prescription. Peremption is a species of prescription "with the characteristic that it does not admit of interruption of suspension". Flowers, Inc. v. Rausch, 364 So.2d 928, 931 (La. 1978). Stated differently, "The difference between

prescription and peremption is that the former simply bars the remedy whereas, in the latter, time is made of essence of the right granted and a lapse of the statutory period operates as a complete extinguishment of the right". Succession of Pizzollo, 223 La. 328, 65 So.2d 783, 786 (1953). If Equilease is correct, then James cannot assert its privilege to collect any premiums that were more than six months overdue when it filed this lawsuit. Cf. La.Civ.Code art 2496 (West Supp. 1984) (prescription begins to run from the day payment is exigible).

[8] Authority exists in Louisiana cases to support the proposition that a prescriptive period defined in a statute conferring a right is actually a peremptive period. See, e.g., Pounds v. Schori, 377 So.2d 1195, 1199 (La. 1979); Succession of Pizzillo, 223 La. 328, 65 So.2d 783 786 (1953); Guillory v. Avoyelles, 104 La. 11, 28 So. 899, 901 (La. 1900). That the statute itself contains the prescriptive period, however, does not mean automatically that the prescriptive period is one of peremption. The

Louisiana Supreme Court has instructed that "each case of this nature should be considered separately on its merits". Pounds v. Schori, 377 So.2d at 1199.

Cases holding a prescriptive period to be one of peremption turn on special considerations - primarily perceived legislative intent to create a right of limited duration. In Pounds v. Schori the statute created a prescriptive period for denying paternity of a child born in wedlock. The court relied on the legislative history of the statute, the manner in which French courts enforced an analogous provision of the Napoleonic Code, and the presumption that children born in wedlock are legitimate, to discern a legislative intent to create a right of limited duration. 377 So.2d at 1199. In Succession of Pizzollo the statute at issue effected a change in adoption laws and provided for a six month transition period. The plain wording of the statute revealed a similar legislative intent. 65 So.2d at 786. Finally, the statute at issue in Guillory v. Avoyelles required that a challenge to a tax

referendum be brought within three months of the election. The court reasoned that the taxpayers should be not allowed to complain after the beneficiary of the tax, in that case a railroad company, "has gone ahead and expended large sums of money in prosecuting the enterprise". 28 So.2d at 901. Thus, considerations of public policy peculiar to the statute favored holding the prescriptive period to be one of peremption. 28 So. at 900-01.

We find, however, no historic or policy consideration to suggest that the limitations period in article 3237 should be anything other than what it explicitly purports to be - a regular prescriptive period. Further, although no Louisiana cases have analyzed the nature of the prescriptive period contained in article 3237, early cases interpreting article 3204 of the Civil Code of 1825 (the predecesssor article to article 3237), without discussing the issue, apply the prescriptive period as if it were one of regular prescription, and not of peremption. In Scott v. His Creditors, 3 La.Ann. 40

(1848), provisional seizure of the vessel suspended prescription against the party who instigated the provisional seizure. In Blanchin v. Steamer Fashion and Owners, 10 La.Ann. 490 (1855), the sheriff taking actual custody of the vessel suspended the prescriptive period in favor of all creditors. If the prescriptive period were peremptive, it could not have been suspended or interrupted for any reason. See, Flowers, 364 So.2d at 931.

[9] In the light of these Louisiana cases, and in the absence of any legislative history or other countervailing considerations, we will apply the six-month prescriptive period in article 3237 as a regular prescriptive period, and not a peremptive period.

B.

[10] A debtor's acknowledgment of a debt interrupts the prescriptive period. La.Civ.Code art. 3520. The debtor may acknowledge the debt verbally, or he may do so in writing, by partial payment, by payment or partial payment of interest, or by some other act or expression of intent to acknowledge the

debt. Lake Providence Equipment Co. v. Tallulah Production Credit Association, 257 La. 104, 241 So.2d 506, 509 (La. 1970); Emery v. Cabral, 400 So. 2d 340, 342 (La.App. 1981). The district court found that Dunnamis acknowledged its debt to James within six months of the time James filed this lawsuit. Our review of the record indicates that this factual finding is not clearly erroneous.

[11] James issued the first year's insurance policy to Dunnamis on July 20, 1979, at which time the premium became due. Between that date and March 20, 1980, Dunnamis made partial payments in the amount of $88,881.12, and on several occasions promised to pay the rest. These acknowledgements tolled the six-month prescription period. Then, sometime between March 20, 1980, and July 17, 1980, the date James issued the second insurance policy, Denning traveled to James' offices to inform James of the Mexican charter and to discuss continuing the insurance coverage for another year even though Dunnamis still owed premiums on the first policy.

On September 29, 1980, approximately three months after James issued the second policy, James executed the Borg-Warner finance agreement, and signed a note for the amount of the past-due premiums. Finally, on January 1, 1981, three months after Dunnamis executed the agreement, James made its first judicial demand for payment.

Dunnamis' actions and assurances between July of 1979 and January of 1981 repeatedly, and at intervals of less than six months, acknowledged its growing debt to James. That the note signed in September of 1980 also created another kind of obligation, with a prescriptive period different from that of the privilege[4] does not affect the character of that act as an acknowledgment of a pre-existing debt. James, having filed a lawsuit approximately three months after the last acknowledgment of the

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4. See, In Re: Red River Line, 115 La. at 872, 40 So.

debt, acted well within the six-month period contained in article 3237.

IV.

We therefore affirm the district court's holding that James held a privilege against the three Equilease vessels for unpaid insurance premiums. By repeatedly acknowledging this debt, at intervals of less than the six-month prescriptive period, Dunnamis kept the privilege alive until James filed a lawsuit three months after the last acknowledgment. The judgment of the district court is

AFFIRMED

at 252.

APPENDIX C

EQUILEASE CORPORATION,
Plaintiff-Appellant,
Cross-Appellee,

v.

M/V SAMPSON, etc., et al.,
Defendants-Appellants,
Cross-Appellees,

v.

FRED S. JAMES & CO., etc.,
Intervenor-Appellee,
Cross-Appellant.

FRED S. JAMES & CO., etc.,
Plaintiff-Appellee,
Cross-Appellant,

v.

EQUILEASE CORP., et al,
Defendants-Appellants,
Cross-Appellees.

No. 83-3298.

United States Court of Appeals,
Fifth Circuit.

April 1, 1985.

Opinion on Rehearing En Banc
May 29, 1985.

Before REAVLEY, JOHNSON AND JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

On this petition for panel re-hearing, Equilease has challenged in fundamental ways, the correctness of our earlier opinion. Pursuant to our request James has submitted a response and we have carefully reviewed the arguments of the parties on rehearing. We are now persuaded that our original opinion is incorrect. We therefore withdraw the opinion, and substitute the following.

I.

Equilease is a financial corporation that in 1974 provided interim construction financing for three vessels, later named the M/V SAMSON, the M/V THOR, and the M/V HERCULES. In 1977 the owner of the vessels defaulted on its loan, leaving Equilease as involuntary owner of the uncompleted vessels. After determining that selling hulls would not be economical, in 1978 Equilease moved the vessels to another shipyard for completion at its own expense.

Upon completion, Equilease transferred title to each of the vessels to a separate, wholly owned, nominally capitalized Unilease[1] "shelf" corporation, taking a preferred first mortgage from each corporation in the amount of construction costs and other expenses.

Having no experience in the operation of vessels, Equilease issued a bareboat charter on each of the vessels to Solar Fleet, Inc. a company wholly owned by James S. Denning. Denning later transferred the charters to Dunnamis Offshore Towing, Inc. ("Dunnamis") another corporation he owned. The Equilease charter required the charter party to purchase insurance for each of the vessels. Dunnamis procured this required insurance from Fred S. James & Company (James).

At the end of the first year of operation, $184,000 of the insurance premiums remained unpaid. Dunnamis informed James that the three vessels soon

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1. Equilease and the three Unilease corporations are collectively referred to as "Equilease", unless indicated otherwise.

would begin operating in Mexico under a lucrative five-year charter agreement. Relying on this information, James decided to provide insurance for the three vessels for another year rather than cancelling the policy and bringing suit for the unpaid premiums. James paid the overdue premiums to the insurers. Then, as James explains, "to clear up the books from an accounting standpoint," he arranged for a financing company, Borg-Warner Insurance Finance Corporation ("Borg-Warner"), to pay the outstanding overdue premiums. James arranged for Borg-Warner to accept a note executed by Dunnamis and then prepared the documents necessary to effect the transaction. Borg-Warner had James guarantee the Dunnamis note so that James, rather than Borg-Warner, bore the risk of non-payment by Dunnamis. When James received funds from Borg-Warner, it made appropriate bookkeeping entries crediting Dunnamis' overdue account in full.

During the second year of their relationship, Equilease became concerned about the manner in

which Dunnamis was operating its vessels. Dunnamis already had defaulted on the charter agreement, and the charter in Mexico had not worked out as expected. Equilease, with some difficulty, finally located its vessels in Panama. It brought the vessels back to the United States at its own expense, then seized them and instituted proceedings in federal district court to foreclose on its preferred mortgages.

By that time Dunnamis evidently also had defaulted on its insurance note payments to Borg-Warner. James as guarantor, feared that it might have to pay Borg-Warner, and therefore intervened in the foreclosure proceedings, claiming a privilege arising under state law, and, alternatively, a maritime lien against the vessels for unpaid insurance premiums. James also filed a separate but substantially similiar lawsuit against Equilease and Dunnamis in personam, and against the three vessels in rem. The district court consolidated the actions.

After hearing the evidence, the court held that James had a state privilege against the vessels for

the amount of the unpaid insurance premiums, and that because Dunnamis acknowledged the debt within six months of the filing of the lawsuit, the applicable six-month limitations period had not lapsed. It refused, however, to create a federal statutory maritime lien in favor of James, relying on this court's decision in Learned v. Brown, 94 F. 876 (5th Cir.1899). It then invalidated the preferred mortgage on the basis that the three Unilease corporation were "shams" and "alter egos" of Equilease against the vessels, thus reducing Equilease to the status of a general creditor against the vessels.[2] It further held

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2. The district court's rationale on this issue leads to confusing and contradictory conclusions, or so it seems to us. If the district court meant that the Unilease corporations are "shams" or "alter egos" of Equilease, then Equilease is the owner of the vessels and not the mortgagee. It therefore has no creditor's claim against ships it in fact owns. The district court, however, indicated that it was invalidating the mortgages "as to James," and referred to Equilease as a "legitimate creditor," but one who could not advance its claims over other general creditors. We are thankful that we are not asked to resolve this conundrum on appeal, and that its resolution is not relevant to the issues we must decide. Equilease does

that Dunnamis was not an agent of Equilease with the power to obligate Equilease to pay the premiums. It entered judgment in favor of James in rem against the vessels and in pe sonam against Dunnamis, who does not appeal 568 F.Supp. 1259.

II.

Equilease argues that the district court's determination that James had a valid state privilege under Civil Code article 3237 for insurance premiums is erroneous on four bases: (1) that the period for asserting the privilege is a peremptive period, rather than a prescriptive period which, contrary to the finding of the district court, could not be acknowledged or interrupted; (2) that if the time period contained in article 3237 is a perscriptive period, James' acknowledgment of the underlying debt had no effect on the privilege, since the underlying debt is distinct and separate from the

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(cont.)
not appeal the district court's holding that the Unilease corporations are "shams" or "alter egos."

privilege; (3) that no legal subrogation exists in favor of James to assert rights to the underlying debt and privilege; and (4) the underlying debt and privilege were extinguished by payment. By cross-appeal, James argues that if we invalidate the state maritime lien, then it is entitled to a lien under the Federal Maritime Lien Act, because marine insurance is a "necessary." Additionally, James alleges that Dunnamis was the agent of Equilease, and therefore Equilease, as principal, is liable in personam for the insurance procurred by Dunnamis.

[1] We have carefully reviewed these arguments, and agree with the first agrument advanced by Equilease, that the time limitation period contained in Civil code article 3227 is a peremptive period, rather than a prescriptive period. Since a peremptive period is not interrupted by acknowledgment of the debt, James' privilege expired or perempted six months from the date the insurance policy was issued and therefore James has no claim against the vessels.

III.

Equilease's first alleged basis for reversing the district court is that James cannot assert its privilege to collect any premiums that were more than six-months overdue when it filed this lawsuit, since the time limitation period in which to enforce the privilege had perempted with respect to earlier premiums. First let us distinguish between peremption and prescription.

[2] Peremption is a species of prescription "with the characteristic that it does not admit of interruption of suspension." Flowers, Inc. v. Rausch, 364 So.2d 928, 931 (La.1978). "The difference between prescription and peremption is that the former simply bars the remedy where as, in the latter, time is made of essence of the right granted and a lapse of the statutory period operates as a complete extinguishment of the right." Succession of Pizzillo, 223 La. 328, 65 So.2d 783, 786 (1953).

Authority exists in Louisiana cases to support the proposition that a prescriptive period defined in

a statute conferring a right is actually a peremptive period. See e.g., Pounds v. Schori, 377 So.2d 1195, 1199 (La.328, 65 So.2d 783, 786 (1953); Guillory v. Avoyelles, 104 La. 11, 28 So. 899, 901 (1900). That the statute establishing the privilege or right also contains the prescriptive period, however, does not mean automatically that the prescriptive period is one of peremption. The Louisiana Supreme Court has stated that "each case of this nature should be considered separately on its merits." Pounds v. Schori, 377 So.2d at 1199.

Cases holding a prescriptive period to be one of peremption turn on special considerations-primarily perceived legislative intent to create a right of limited duration. In Pounds v. Schori, the statute created a prescriptive period for denying paternity of a child born in wedlock. The court relied on the legislative history of the statute, the manner in which French courts enforced an analogous provision of the Napoleonic Code, and the presumption that children born in wedlock are

legitimate, to discern a legislative intent to create a right of limited duration. 377 So.2d at 1199. In Succession of Pizzillo the statute at issue effected a change in adoption laws and provided for a six-month transition period. The plain wording of the statute revealed a similar legislative intent. 65 So.2d at 786. Finally, the statute at issue in Guillory v. Avoyelles required that a challenge to a tax referendum be brought within three months of the election. The court reasoned that the taxpayers should be not allowed to complain after the beneficiary of the tax, in that case a railroad company, "has gone ahead and expended large sums of money in prosecuting the enterprise." 28 So. at 901. Thus, considerations of public policy peculiar to the statute favored holding the prescriptive period to be one of peremption. 28 So. at 900-01.

IV.

Turning now to the particular statute before us, we note that the Louisiana Supreme Court in In re Red River Line, 115 La. 867, 40 So. 250 (1905),

stated (in the syllabus) that the privilege contained in article 3237 perempts or dies at the end of six months. In that case the creditor was asserting a vendor's privilege or lien for the unpaid balance of a vessel. Although the contract declared that the transaction was a cash sale, the vendor had received a promissory note for a portion of the sale price. The promissory note was payable eighteen months after date. The purchaser was placed in receivership before the note was payable but after six months from the date of the sale. The vendor attempted to assert a vendor's privilege or lien under article 3237. The other creditors opposed the vendor's asserted privilege on the basis that the lien had either been waived, or extinguished by "prescription." The court decided the case on the latter basis.

Although the holding of the case that the period is one of peremption is contained only in the syllabus and not stated clearly in the opinion, the Louisiana courts have held that when the syllabus is prepared by the Louisiana Supreme Court, as it was by specific

notation in Red River Line, it reflects the reasoning in the opinion and the ruling made. State, Through Dept. of Highway v. LaBauve, 225 La.330, 72 So.2d 865, 867 (1954); Williams v. Marionneaux, 240 La.713, 124 So.2d 919, 922, n. 6 (1960). Furthermore, the court's holding that the period contained in article 3237 is peremptive, rather than prescriptive, is supported by language in the text of the opinion in which the court stated that no plea of prescription was necessary. This statement would indicate that the time limitation period is peremptive since, at the time of Red River Line opinion, it was not necessary that peremption be pleaded, but it was necessary that prescription be pleaded. La.Civ.Code art. 3460 (prior to its amendment in 1983); La.Civ.Code art. 3452. We also note that James has conceded in its brief on petition for rehearing that Red River Line held that the period contained in article 3237 is a peremptive period.

It has not been necessary in cases arising since the Red River Line decision for Louisiana courts to

specifically decide whether the time limitation period contained in article 3237 is a prescriptive period or a peremptive period. In Graeme Spring & Brake Service v. DeFelice, 98 So.2d 314 (La.App.1957), the court held that the limitation period contained in article 3237 had been "interrupted" by the filing of an ordinary suit which sought to impress the vessel with the privilege. The lawsuit was instituted well within the six-month period; in other words, the privilege was timely claimed. Although the court referred to the time period in terms of "prescription", we place little significance in this use of the term in the contaxt of the case. The term was imprecisely used without analysis as it was unncessary to its decision to determine whether article 3237 contained a prescriptive or peremptive period because the privilege was claimed in time. The time limitation period contained in aritlce 3237 was also discussed in In re Safticraft Corporation, 255 F.Supp. 797 (W.D.La.1966). Again, Safticraft is not helpful here since it did not address the issue before us. The

primary issue in that case was when the six-month period begins to run. The court held that in the case of a privilege arising out the original construction of the vessel, the prescriptive period "does not commence to run until after the vessel is completed and delivered or 'sold' to the owner." Id. at 804. It was unnecessary to decide, and the court did not decide, whether the time limitation period contained in article 3237 was prescriptive or peremptive. The holding in Safticraft is clearly limited by its facts to vessels under construction.[3]

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3. James argues on petition for rehearing that, as a general proposition, the privilege provided in article 3237 does not begin to run until a vessel is seized and sold, citing In re Satficraft. We reject James' reading of In re Safticraft since it would render the six-month period meaningless in practically all cases. This is true because the six-month period would have no relationship to the date of the contract to which the privilege applies. Additionally, we make it clear that we do not approve or disapprove the limited holding of In re Safticraft.

V.

In our original opinion, in which we virtually overlooked Red River Line, we held that the time limitation period contained in article 3237 was a prescriptive period. Today we reach the opposite result. Our original opinion was based on what we perceived to be the implicit holdings of cases, earlier decided that Red River Line, analyzing article 3204, the predecessor to article 3237. These cases were Scott v. His Creditors, 3 La.Ann. 40 (1848) and Blanchin v. Steamer Fashion and Owners, 10 La.Ann. 49 (1855). In both of these cases, the time period in article 3204 (now 3237) was suspended by provisional seizure of the vessel. We concluded that the implicit holding of these cases was that the time period was prescriptive, since if it were peremptive it could not be interrupted for any reason.

Given our second occasion to consider this issue, and aided by the thoughtful briefs of Louisiana counsel, we are persuaded that the time-limitation period contained in article 3237 is a peremptive

period. First, the later Louisiana Supreme Court case of Red River Line explicitly states in its syllabus that the time period is peremptive. Although the case interchangeably uses the terms "prescription" and "peremptive", this imprecision is not determinative because "peremption" is but a species of the more inclusive term "prescription". Additionally, language in the body of the text supports the argument that the Louisiana Supreme Court considered the time period to be one of peremption.

Second, we believe our earlier analysis is incorrect because the provisional seizure that suspended the privilege period in Scott and Blanchin is more properly viewed as an exercise - not an interruption-of the privilege provided by the Code. In Scott, the only creditors who were entitled to the privilege were those who had joined in the seizure of the vessel and who asserted claims falling within the statutory privilege period, thereby timely exercising their privilege. A similar result was

reached in Blanchin. We hold, therefore, that the time-limitation period contained in article 3237 is a peremptive period which expired six months from the date of the insurance contract.

Finally, it is clear that none of the acts of acknowledgment asserted by James constitutes an exercise of the special six-month privilege provided in article 3237. The privilege contained in article 3237 is an accessory right to the underlying obligation to pay insurance premiums. The Red River Line opinion makes it clear that the six-month privilege is distinct from the ten-year presciptive period for the payment of insurance premiums. Continental Insurance Co. v. Fairfield Temporaries, Inc. 437 So.2d 376 (La.App.1983). The acts of acknowledgment in this case, that is Dunamis' partial payment of insurance premiums and promises to pay the balance, served only to interrupt the prescriptive period of the underlying obligation to pay the premiums, and was not an assertion of the privilege itself. Indeed, it is beyond dispute that James took

no steps to enforce its claim under the privilege. We further hold, therefore, that the privilege provided in article 3237 expired, or "perempted," having never been claimed.

VI.

[3] James argues on cross-appeal that even if we hold that it does not have a valid state privilege, we should nevertheless hold in its favor by recognizing a federal maritime lien for the unpaid insurance premiums. In Learned v. Brown, 94 F. 876 (5th Cir. 1899), this court held that when an insurance policy is written for the sole and exclusive benefit of the owners and does not insure to the benefit of the ship, there is no lien for insurance premiums granted under general maritime law. James argues that we should overrule Learned v. Brown in this case, since, according to James, its principles are archaic and have no place in the modern commercial world. We note initially that the Sixth Circuit recently reaffirmed in Grow v. Steel Gas Screw Loraine K, 310 F.2d 547 (6th Cir. 1979), that

"neither admiralty law nor the Federal Maritime Lien Act (46 U.S.C. §§ 971-75) provide[s] for a lien for unpaid insurance premiums." Thus, this "archaic principle" has been given recent application. Furthermore, even if we were inclined to overrule Learned v. Brown, we could not do so, since it is clear that one panel of this court cannot overrule an earlier panel's decision. United States v. Albert, 675 F.2d 712 (5th Cir. 1982).

[4-6] James also argues that Dunnamis was the agent of Equilease, rather than a bareboat charterer. If an agency relationship did exist, Equilease, a principal, would be liable for the unpaid insurance premiums. James argues that Equilease provided the financial backing for and management control over Dunnamis to the extent that Equilease cannot be considered to have transferred dominion and control of the vessels to Dunnamis. In its opinion the district court stated: "Although Denning[4] received 'favorite

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4. Denning was the owner Dunnamis.

son' treatment from Equilease throughtout this period, this treatment did not make him the agent of Equilease." The existence of any agency relationship is a question of fact which should not be reversed on appeal unless it is clearly erroneous. Strachan Shipping Co. v. Dresser Industries, Inc., 701 F.2d 483 (5th Cir.1983). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been commited. United States v. United States Gypsum Co., 333 U.S. 364, 68 S.Ct. 525, 92L.Ed. 746 (1948); Musial v. A & A Boats, Inc., 696 F.2d 1149 (5th Cir.1983). After reviewing the relevant evidence, we are not persuaded by James' arguments that the district court was clearly erroneous in its conclusion that Denning was not the agent of Equilease.

VII.

We therefore withdraw our original opinion, and reverse the district court. We hold that James'

privilege as provided by Louisiana Civil Code article 3237 had expired since the time-limitation period contained in article 3237 is a peremptive period. We have carefully considered the arguments presented on cross-appeal by James, but for the reasons assigned above, we have rejected them. The district court, accordingly, is

REVERSED.

APPENDIX D

EQUILEASE CORPORATION,

Plaintiff-Appellant,
Cross-Appellee,

v.

M/V SAMPSON, etc., et al.,

Defendants-Appellants,
Cross-Appellees,

v.

FRED S. JAMES & CO., etc.,

Intervenor-Appellee,
Cross-Appellant,

* * * * * * * *

FRED S. JAMES & CO., etc.

Plaintiff-Appellee,
Cross-Appellant,

v.

EQUILEASE CORP., et al.,

Defendants-Appellants,
Cross-Appellees.

Filed April 25, 1986,
as amended on May 5, 1986, and May 28, 1986

BEFORE: Clark, Chief Judge, Gee, Rubin, Reavley, Politz, Randall, Johnson, Williams, Garwood, Jolly, Higginbotham, Davis, Hill and Jones, Circuit Judges.

Opinion by Judge E. Grady Jolly; Partial Concurrence, Partial Dissent by Judge W. Eugene Davis, with whom Judges Randall and Higginbotham join.

Appeals from the United States District Court for the Eastern District of Louisiana. Henry A. Mentz, Jr., District Judge, Presiding.

OPINION

E. GRADY JOLLY, Circuit Judge:

The facts of this case are reported in detail in the district court opinion Equilease Corp. v. M/V SAMPSON, 568 F.Supp. 1259 (E.D.La. 1983), and in our panel opinion, Equilease Corp. v. M/V SAMPSON, 756 F.2d 357 (5th Cir. 1985). We agreed to hear this case en banc to decide the issue whether

insurance is a necessary under the Federal Maritime Lien Act, 46 U.S.C. §971-5(1982) ("FMLA" or the "Act"), so that an unpaid insurance company may claim a federal maritime lien on the insured vessel.[1] We now expressly overrule Learned v. Brown, 94 F. 876 (5th Cir. 1899), and hold that marine insurance is a necessary under the Federal Maritime Lien Act, and thus may be given the status of a federal maritime lien.

I.

The essential facts are these. Equilease is a financing corporation that in 1974 provided interim construction financing for three vessels. In 1977 the vessels' owner defaulted on its loan and Equilease became the owner of the vessels. Equilease transferred title to each vessel to one of three

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1. Although under the Fifth Circuit's internal operating procedures the effect of the granting of a rehearing en banc is to vacate the panel opinion, see Internal Operating Procedures following Local Rule 35.6, the court today reinstates the panel's ruling in Parts II, III, IV, and V of its opinion, Equilease Corp. v. M/V SAMPSON, 756 F.2d at 360-62.

separate, wholly-owned, nominally capitalized "shelf" corporations, taking a preferred first mortgage from each corporation in the amount of construction cost and other expenses.

Equilease then issued a bareboat charter on each vessel to a company wholly owned by James Denning. Denning transferred the charters to Dunnamis Offshore Touring, Inc., another corporation he owned. As required by the charters, Dunnamis purchased insurance for each vessel. The insurance was purchased from various insurance companies through the agent Fred S. James & Company of Texas, Inc. ("James"), at a cost of over $200,000. When $184,000 of the insurance premiums remained unpaid at the end of the first policy year, James, instead of suing Dunnamis for the balance, arranged financing of the premium with Borg-Warner Insurance Finance Corporation ("Borg-Warner"). Borg-Warner paid Dunnamis' debt to James, and James' accountant credited Dunnamis' account in full. James guaranteed the debt by endorsing a note executed by Dunnamis

to Borg-Warner. As a result of this guarantee, James, rather than Borg-Warner, bore the risk of Dunnamis' non-payment to Borg-Warner.

Dunnamis soon defaulted on the charter agreement with Equilease. Equilease located and seized the vessels, and instituted proceedings in federal district court to foreclose on its preferred mortgages.

By that time Dunnamis also had defaulted on its insurance note payments to Borg-Warner. James, who later satisfied the debt, intervened in the foreclosing proceedings, claiming a state privilege[2] and a maritime lien against the vessels for unpaid insurance premiums. James also filed a separate but substantially similar lawsuit against Equilease and

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2. The Louisiana Civil Code provides that a debtor's property is the common pledge of his creditors, and in the absence of cause for preference, the creditors rank equally. La. Civil Code art. 3183 (West 1952). One cause of preference is the privilege, which arises by operation of law, and allows a creditor preferred status over other creditors because of the nature of the debt owed him. La. Civil Code arts. 3184 and 3186.

Dunnamis in personam, and against the three vessels in in rem. The district court consolidated the actions.

After hearing the evidence, the court held that James had a state privilege against the vessels for the amount of the unpaid insurance premiums, and that because Dunnamis acknowledged the debt within six months of the filing of the lawsuit, the applicable six-month limitations period had been interrupted and thus had not lapsed. It refused, however, to recognize a federal statutory maritime lien in favor of James, relying on this court's decision in Learned v. Brown, 94 F. 876 (5th Cir. 1899). It then invalidated the preferred mortgages against the vessels on the basis that the three Unilease corporations were "shams" and "alter egos" of Equilease, and reduced Equilease to the status of a general creditor against the vessels. It further held that Dunnamis was not an agent of Equilease with the power to obligate Equilease to pay the premiums. The district court entered judgment in favor of James

in rem against the vessels and in personam against Dunnamis.

The panel reversed the district court, holding that the six-month period was one of peremption, not prescription, and thus could not have been interrupted by Dunnamis' acknowledgement of the debt. The state lien had therefore expired, so James had no state claim against the vessels. The panel then held that it could not overrule Learned v. Brown, 94 F. 876 (5th Cir. 1899), and letting that decision stand, ruled that there was no federal maritime lien for unpaid insurance premiums.

II.

[1] The issue before the en banc court is whether we should overrule Learned and recognize a federal maritime lien in James' favor for the unpaid insurance premiums. In refusing to recognize such a lien, the district court and the panel both followed the precedent of Learned, which held that maritime insurance on a vessel is for the sole and exclusive benefit of the vessel owners, not inuring to the

benefit of the vessel and therefore that no lien arises for unpaid insurance premiums under general maritime law.

[2] Learned was decided in 1899, eleven years before the passage of the Federal Maritime Lien Act, 46 U.S.C. §§ 971-75. The decision was based on general maritime principles that denied a lien for materials and services rendered in the vessel's home state. Because the vessel in Learned was a Louisiana vessel operating solely within Louisiana, the Fifth Circuit held that no general maritime lien could attach under federal law. The Learned court then considered whether the insurers had a lien and privilege under the law of Louisiana. This lien too was denied because "the insurance written was for the sole and exclusive benefit of the owners of the steamboat, and in no wise inured to the benefit of the ship or maritime lienholders." Learned, 94 F. at 883.

Anaysis of the question under the Federal Maritime Lien Act, James argues, leads to a different

conclusion. James urges that in determining what constitutes a necessary under the Federal Maritime Lien Act, this court should apply the test that asks whether the furnished supplies or services are "reasonably needed in the ship's business."[3] James further suggests that Learned can be read narrowly as a decision of state law, not a federal law, and therefore might not control the result in this case.

Equilease, on the other hand, argues on appeal that the federal maritime lien is a preferential one that should not be granted to those who advance premiums for the marine insurance. In support of this position, Equilease first argues that because insurance is not physically delivered to the vessel, it is not "furnished" to the vessel within the meaning

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3. This is the test that has been articulated by two district courts. See Layton Industries, Inc. v. Sport Fishing Cruiser Gladiator, 263 F.Supp. 356 (D.Mass.1967); Walker-Skageth Food Stores, Inc. v. The Bavois, 43 F.Supp. 109 (S.D.N.Y.1942).

of 46 U.S.C. §971.[4] Second, Equilease argues that neither general admiralty law nor the Federal Maritime Lien Act provides a maritime lien for unpaid insurance premiums because insurance is not a necessary for the benefit of the vessel. In support of this proposition, Equilease cites Learned and Grow v. Steel Gas Screw Lorraine K, 310 F.2d 547 (6th Cir. 1972), and the rationale that a contract of insurance in no way aids the ship. Equilease's third argument is that James did not rely on the credit of the vesssels when it advanced the insurance premiums, and therefore James may not claim a federal maritime lien. Equilease's first argument is

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4. 46 U.S.C. §971 provides in full:

Persons entitled to lien

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

that even if a maritime lien did arise in James' favor, the lien expired when James received payment from Borg-Warner in the amount of the insurance premiums owed by Dunnamis. Equilease reasons that this payment in full to James extinguished any right that James had to assert a privilege.

To answer the question whether insurance is a necessary under the Federal Maritime Lien Act, we first examine briefly the history and nature of the federal maritime lien.

III.

[3] Under the FMLA, a maritime lien is established in favor of those who furnish "repairs, supplies, towage, use of drydock or marine railway, or other necessaries, to any vessel . . . ." 46 U.S.C. §971 (emphasis added).[5] Although maritime liens are to be strictly construed, the provision of necessaries for a vessel has long been recognized as the basis

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5. See footnote 4 for the text of section 971.

for a lien. See Atlantic & Gulf Stevedores, Inc. v. M/V Grand Loyalty, 608 F.2d 197, 200 (5th Cir. 1979).

One purpose of the Ship Mortgage Act, 46 U.S.C. §911. et seq. (1982), of which the Federal Maritime Lien Act is a part, was to establish sound security in favor of loans to ship owners. Merchants & Marine Bank v. The T. E. Welles, 289 F.2d 188 (5th Cir. 1961); First Suffolk National bank of Huntington v. The Air brandt, 125 F. Supp. 709, 710 (E.D.N.Y. 1954). History shows that the merchant marine industry was faltering in 1910; Congress passed the Act in an attempt to spur incentive for the financing of shipowners by making private investment in shipping more attractive than it had been. The Act is esentially a compromise between two conflicting interests: that of the materialmen, who wanted an automatic and far-reaching lien, and that of the shipowners, who preferred never to have any lien attach. Gilmore and Black, The Law of Admiralty, at 653.

[4] The federal maritime lien is a unique security device, serving the dual purpose of keeping ships moving in commerce while not allowing them to escape their debts by sailing away. Riffle Petroleum Co. v. Cibro Sales Corp., 601 F.2d 1385, 1389 (10th Cir. 1979). The lien is a special property right in the vessel, arising in favor of the creditor by operation of law as security for a debt or claim. The lien arises when the debt arises, and grants the creditor the right to appropriate the vessel, have it sold, and be repaid the debt from the proceeds. The Poznan, 9 F.2d 838 (2nd Cir. 1925), rev'd on other grounds, sub nom New York Dock Co. v. the Poznan, 274 U.S. 117, 47 S.Ct. 482, 71 L.Ed. 955 (1927). Thus the maritime lien may be defined as a property right that adheres to the vessel wherever it may go. Pierside Terminal Operators, Inc. v. M/V Floridian, 389 F. Supp. 25, 26 (E.D.Va. 1974): The Rupert City, 213 F. 263, 267 (W.D. Wash. 1914). Such a lien has been held to follow the vessel even after it is sold to an innocent purchaser. The Joseph Warner,

32 F. Supp. 532 (D.C. Ma. 1939). The maritime lien is a lien on the vessel, "and only indirectly, inasmuch as it conflicts with the owner's rights in the vessel, it is connected with the owner." Pierside Terminal Operators, 389 F. Supp. at 26. The maritime lien concept thus somewhat personifies a vessel as an entity with potential liabilities independant and apart from the personal liability of its owner. Todd Shipyards Corp. v. The City of Athens, 83 F. Supp. 67 (Md. 1949).

[5] The second major purpose of the Federal Maritime Lien Act was to remove certain limitations on the right to liens and substitute a single federal statute for the statutes of the various states. Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1, 41 S.Ct. 1, 65 L.Ed. 97 (1920). Prior to the passage of the FMLA, a distinction had been drawn between a vessel in her home port and a vessel in a foreign port. A lien could be given for necessaries furnished to a vessel in a port of a foreign state if the necessaries were

furnished upon the credit of the vessel. No such lien, however, was given for necessaries furnished in the home port or state. There also was a discrepancy among the court decisions as to when and under what circumstances repair or supplies should be held to have been furnished relying on the credit of the vessel. In re Burton S.S. Co., 3 F.2d 1015 (D.C. Mass. 1925); The Lucille, 208 F. 424 (D.C.Ala. 1913). With the creation of the federal maritime lien, a single federal statute is substituted for the state statutes insofar as they confer liens for repairs, supplies and other necessaries, and the old geographical distinctions are gone. Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of California, 310 U.S. 268, 272, 60 S.Ct. 937, 940, 84 L.Ed 1197 (1940); Piedmont, 254 U.S. at 11.

IV.

[6] The Act provides a right to a federal maritime lien to "any person furnishing repairs, supplies, ... or other necessaries, to any vessel ..." 46 U.S.C. §971. Equilease argues that the concept

of "furnishing" requires a physical delivery to the vessel. Equilease's heavy reliance on a literal interpretation of the work "furnishing," however, is misplaced. To read "furnishing" as requiring an actual thing to be physically delivered to the vessel would foreclose any intangible services from ever being held necessaries under section 971. The term "necessary" under the FMLA includes most goods or services that are useful to the vessel, keep her out of danger, and enable her to perform her particular function. Necessaries are the things that a prudent owner would provide to enable a ship to perform well the functions for which she has been engaged. 2 Benedict on Admiralty §34 (7th ed. 1984). These "things" may be money, labor and skill, and personal services as well as materials. "It is the present, apparent want off the vessel, not the character of the thing supplied, which makes it a necessary." Id. As an example, we have held that printing for advertising is sufficient to give rise to a maritime lien. Colonial Press of Miami, Inc. v. The Allen's

Cay, 277 F.2d 540 (5th Cir. 1960). See also Stern, Hays & Lang, Inc. v. M/V NILI, 407 F.2d 549, 551 (5th Cir. 1969). What is a "necessary" is to be determined relative to the requirements of the ship. 2 Benedict on Admiralty §37 at 3-28. Anchors and cables are generally considered to be necessaries, but if the vessel is fully supplied with them, the furnishing of another anchor or cable is not "necessary". Id., §34 at 3-19.

[7] We find no persuasive reason to read the term "furnishing" so narrowly as Equilease would urge. The statute was intended to encourage private investment in the maritime industry. We will not begin now to defeat the purpose of the Act by layering technicalities onto its interpretation. We hold that 'furnishing" in section 971 does not necessarily require an actual delivery of something to the vessel. That neither James nor the insurers physically delivered anything to any of Equilease's vessels does not bar James' claim to a lien.

V.

Equilease next argues that no maritime lien arises in favor of James because insurance is not a "necessary" and therefore neither general admiralty law nor the Act provides a maritime lien for unpaid insurance premiums. Equilease relies on Learned and on Grow v. Steel Gas Screw Lorraine K, 310 F.2d 547 (6th Cir. 1962), for this proposition. The Grow court stated in one sentence without elaboration that there is no federal maritime lien for insurance premiums, 310 F.2d at 549, and went on to grant the plaintiff insurance broker a lien under Michigan state law. Grow is thus not of much aid to us here. We focus instead on Learned.

As a mortgage creditor of the steamboat "Liberty", Learned argued to this court in 1899 that policies of insurance on the "Liberty" were for the sole and exclusive benefit and use of the owners of the vessel, in no way inuring to the benefit of the ship itself. This court agreed with Learned and held that no lien arose on the vessel for premiums due

on the insurance policies. The court reasoned that because the policies were solely for the benefit of the vessel's owners, they did not benefit the ship and the ship could therefore not be held accountable for them.

Learned was based on an interpretation of state law prior to the passage of the Federal Maritime Lien Act. General maritime law in 1899 denied a lien for materials and services rendered in the waters of the vessel's home state. The Roanoke, 189 U.S. 185, 193, 23 S.Ct. 491, 47 L.Ed. 770. Since the "Liberty" travelled only in a Louisiana bayou, it fell within this "home port" doctrine and no federal maritime lien could attach for insurance premiums or for any other supplies and materials furnished in the home port upon the credit of the owners. The Learned court also held that no lien arose in favor of the insurers, under either federal law or Louisiana law, because it deemed the insurance policy to be a contract "written for the sole and exclusive benefit of the owners of the steamboat." Learned, 94 F.

at 883. See Also The Prilla, 21 F.Supp. 383 (D.C.D. Ma. 1937); The Wabash, 279 F. 921 (D.C.D. Conn. 1922). Equilease urges us to apply Learned and to find that marine insurance in 1986 inures solely to the benefit of a ship's owner, in no way aiding the ship, and therefore that no federal lien can be had for unpaid insurance premiums. This we cannot do.

[8] In the nineteenth century, an insurance policy on a ship was viewed as a contract for the personal idemnity of the insured ship's owner. Under this reasoning, no lien against the ship itself could possibly arise as the result of an insurance policy; "[u]nless the ship is benefitted the ship should not pay." In Re Petition of Insurance Co. of Pennsylvania, 22 F. 109, 116 (N.D.N.Y. 1884), Aff'd sub nom. Insurance Co. of Pennsylvania v. The Proceeds of the Sale of the Barge Waubauschene, 24 F. 559 (C.C.N.D.N.Y. 1885). It is no longer appropriate, however, to view maritime insurance this way. Even a vessel that simply sits at a dock without making any attempt to ply the waters must

today have hull protection and indemnity insurance. As the district court noted, insurance is something that every vessel today needs just to carry on its normal business. Equilease, 568 F.Supp. at 1263. Equilease itself required all of its affiliate companies to carry adequate insurance and would not do business with any company that failed to do so. Equilease, 568 F.Supp. at 1263. The Bareboat Charter Party entered into by the Equilease "shelf" corporations with Dunnamis required that throughout the term of the charter, "the charterer shall, at his own expense, keep the vessel insured against ... risks ... in an amount ... not less than the greater of the initial cost of the vessel or the full commercial value of the vessel ..." The agreement specifically required insurance coverage for property damage, personal injury and death to third parties and crew, breach of warranty, pollution, cargo and tower's liability, and provided that war risk hull and indemnity insurance would be required at the owner's discretion. The Charter Party also mandated that

any insurance payments for losses greater than $10,000 (but less than total loss of the vessel) were to be made to the owner, or to a designated mortgagee, who was required to apply such funds directly for repairs, liabilities, salvage claims, or other charges and expenses, or to reimburse the charterer for any money he had advanced for repairs and claims covered by the policy. In the light of this type of agreement, the nineteenth century view of marine insurance as an optional contract, entered into by a shipowner at his own discretion solely for his own personal indemnity, must fade into the shadows of history.

[9] We therefore hold that because insurance is essential to keep a vessel in commerce, insurance is a "necessary" under 46 U.S.C. §971 and unpaid insurance premiums to give rise to a maritime lien under the FMLA.

This determination, however, does not resolve the case before us. Our holding recognized that a federal maritime lien may have arisen against the

vessels in James' favor for the balance of the insurance premiums that Dunnamis failed to pay. The question remains whether James has met the other statutory requirements of the lien.

VI.

Equilease insists that for James to claim a right to a federal maritime lien, it must have relied on the credit of the vessels when it furnished the insurance. Equilease points to evidence and testimony in the record indicating that James relied solely on the credit of Equilease, Dunnamis and Eltra Corporation, the owner of Equilease, and argues that James has no right to assert the lien. For the proposition that a creditor who relies solely on the credit of one other than the vessel may not claim a federal maritime lien, Equilease cites W. A. Marshall & Co., Inc. v. The President Arthur, 279 U.S. 546, 49 S.Ct. 420 (1929), and Gulf Trading & Transportation Co. v. The Vessel Hoegh Shield, 658 F.2d 363 (5th Cir. 1981).

Equilease's argument at first appears to be contrary to the express language of the FMLA. Section 9971 provides that "it shall not be necessary to allege or prove that credit was given to the vessel." Examination of the history of the principles and a study of the cases interpreting the statute, however, reveal the merits of Equilease's argument.

Prior to the initial passage of the Act, 36 Stat. 604, the law was settled that a federal maritime lien could arise only for necessaries furnished in reliance upon the credit of the vessel. Credit to the ship, as distinguished from credit to the owner, was essential to the existence of a maritime lien. The St. Jago de Cuba, 22 U.S. (9 Wheat.) 409 (1824). Because the lien arose against the ship and gave the lienor a right to seize the ship upon process of the admiralty court, such a drastic remedy was to be made available only to creditors who had relied on the credit of the ship itself. If the goods or services had instead been furnished in reliance upon the credit of the owner or a third party, then the creditor had

recourse for the debt other than against the vessel itself, and no lien would arise.

When the FMLA was passed in 1910, a debate arose among the courts about the interpretation to be given the phrase concerning credit to the vessel. The cases interpreting the Act immediately after its passage did not even consider the possibility that Congress had intended to dispense with credit to the ship as a prerequisite to the lien. Gilmore and Black, The Law of Admiralty at 665-66. Then in 1920 two relevant events occurred: Congress re-enacted the Act as part of the Ship Mortgage Act without amending this provision, and the Supreme Court decided Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1, settling the debate. Piedmont held that the relevant language in the Act served only to remove from the creditor the burden of proving that he had relied on the credit of the vessel. The presumption that the vessel's credit was relied upon, a presumption formerly available only to creditors furnishing

necessaries to a vessel in a port or jurisdiction foreign to it, see Gilmore and Black, The Law of Admiralty at 664-65, was now granted to "[a]ny person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic ..." 46 U.S.C. §971.

[10] Despite the language of the Act, the idea of credit to the vessel being a prerequisite to a lien, and the concomitant principle that credit to the owner negates the lien, are still very much with us today. Thus, under section 971, a presumption arises that one furnishing supplies to a vessel acquires a maritime lien, and the party attacking this presumption has the burden of establishing that the personal credit of the owner or charterer was solely relied upon. TTT Stevedores of Texas, Inc. v. M/V Jagat Vijeta, 696 F.2d 1135, 1139 (5th Cir. 1983); General Electric Credit & Leasing Corp. v. Drill Ship Mission Exploration, 668 F.2d 811, 814 (5th Cir. 1982); see also Sasportes v. M/V Sol de Copacabana,

581 F.2d 1204, 1209 (5th Cir. 1978).[6] To meet this burden, eivdence must be produced that would permit the inference that the supplier purposefully intended to forego the lien. Gulf Oil Trading Co. v. M/V Caribe Mar, 757 F.2d 743, 750 (5th Cir. 1985); TTT Stevedores, 696 F.2d at 1139; Farrell Ocean Services, Inc. v. United States, 681 F.2d 91, 93-94 (1st Cir. 1982); Gulf Trading & Transportation Co. v. The Vessel Hoegh Shield, 658 F.2d 363, 368 (5th Cir. 1981); Point Landing, Inc. v. Alabama Dry Dock & Shipbuilding Co., 261 F.2d 861, 867 (5th Cir. 1958). Because of the strong presumption in favor of a maritime lien, it is necessasry that a party opposing the lien prove that the creditor, in this case James, deliberately intended to look solely to the owner's personal credit and to forego the valuable privilege afforded it by law. Gulf Oil Trading, 757 F.2d at 750.

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6. "[U]ntil there is a proper denial with supporting proof to the contrary, the presumption is that the goods were furnished on the credit of the vessel." Colonial Press of Miami, Inc. v. The Allen's Cay, 277 F.2d 540, 541 (5th Cir.1960).

Because it relied on Learned v. Brown and found that no federal maritime lien had arisen in James' favor, the district court did not make a finding as to what credit James relied upon in advancing the insurance premiums. Equilease argues, however, that there is uncontradicted evidence in the record that James did not rely on the credit of the vessel when it advanced the monies for the insurance premiums. William Keith Hargrove, former manager of James' Marine, Oil and Gas Department, who handled the Equilease and Dunnamis accounts, testified at trial that James had relied on the credit of Equilease and Dunnamis. Hargrove was asked on cross-examination, "What did you rely on for payment of those insurance premiums? .... Who or what did you rely on?" He responded that it had been James' understanding "from the very beginning" that Equilease, whether directly or indirectly, was being relied upon, in that James was receiving money from Dunnamis that had been furnished to Dunnamis by Equilease. When the cross-examiner probed, "So you

are saying you relied only on Dunnamis, Equilease, and/or Eltra, is that a fair statement?" Hargrove replied, "That's a fair statement."[7] James itself states in its original brief filed in this court: "The Unilease Companies were totally funded for the operations of the Vessels by Equilease and it was the credit of Equilease upon which all parties placed total reliance.[8] James contests this showing only by quoting a general statement made by Hargrove on direct examination — "There is no intent for us to give up anything" — and by alleging that Equilease has not adduced enough evidence of James' reliance

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7. Eltra Corporation was Equilease's owner at the time.

8. The dissent implicitly acknowledges this unrefuted testimony that reliance for payment of the debts was placed altogether on other sources. The dissent places the words of the witness in the fuller context of his entire testimony, but their impact remains unchanged. Whether this testimony is placed in full context or excerpted, the point is clear: in advancing payment for the insurance premiums, the credit of the vessel was not considered in the slightest, and not having been considered, there plainly could have been no reliance.

on someone or something other than the vessels to show that James waived its lien.

[11] We find that the relevant parts of the transcript and record make it clear that James did not rely on the credit of the insured vessels when advancing the money for the premiums, but rather relied on the credit of Equilease and Dunnamis. The uncontradicted testimony and the concession made by James in its brief overcomes the presumption that James relied on the credit of the vessel.[9] We find no evidence that James conducted its business with

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9. The dissent argues that the question is not whether James consciously relied on the credit of the vessel. Rather, the dissent insists that "the question which should be asked is whether the record compels the inference that James deliverately or purposefully intended toforego its right to a lien." The answer to the question is, yes. First, in the absence of reliance — intentional, by presumption, or otherwise — there is no right to claim a lien; in different words, if one purposefully foregoies reliance on the credit of the vessel, it is tantamount to purposefully foregoing the right to claim a lien against the vessel. Thus, when James deliverately chose not to rely on the credit of the vessel, as a matter of law it purposefully intended to forego its right to claim the lien.

Equilease and Dunnamis in such a way as to preserve a federal maritime lien.[10] Because James did not rely on the credit of the vessels, either wholly or in part, it may not claim a federal maritime lien for the unpaid insurance premiums.[11]

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10. Indeed, James could not have reasonably expected to have relied on a federal maritime lien, because until today, this circuit recognized no such lien in favor of a creditor who advances insurance premiums.

11. James also claims that if it is denied a lien, it should be able to collect the unapid insurance premiums from Equilease as restitution under a contract theory of unjust enrichment. Recognizing that this court has subject matter jurisdiction in admiralty to hear this claim, see International Sea Food Ltd. v. M/V Campeche, 566 F.2d 482, 485 (5th Cir.1978) ("that marine insurance is a maritime contract within the jurisdiction of an admiralty court has long been settled"), we find James' argument meritless. Unjust enrichment is an equitable remedy to be invoked only when there is no available remedy at law. Fidelity & Deposit Co. of Maryland v. Smith, 730 F.2d 1026, 1030 (5th Cir.1984); Austin v. North American Forest, 656 F.2d 1076, 1088-89 (5th Cir.1981). Because James has a remedy at law in an action available against Dunnamis, its claim for equitable restitution cannot be entertained.

VII.

Accordingly, Learned v. Brown, 94 F. 876, is overruled. Marine insurance on vessels is a necessary under the Federal Maritime Lien Act and unpaid insurance premiums may give rise to a federal maritime lien in favor of the insurerer. James, however, is denied a federal maritime lien because it has been shown to have not relied on the credit of the vessels when it advanced the insurance premiums. The district court is

REVERSED.[12]

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12. The dissent predicts that our decision, allowing a competing creditor to defeat a lien by showing that the claimant did not rely on the credit of the vessel, will create special trial problems. We do not foresee special problems. In such cases, there usually will be a clear and routinely resolved question before the court: does the evidence show that the credit of the vessel was not relied upon to any extent? If competent and credible evidence proves that the claimant did not rely to any extent on the credit of the vessel, then the right to claim a federal maritime lien against the vessel will be defeated.

W. EUGENE DAVIS, Circuit Judge, with whom Carolyn Dineen Randall and Patrick E. Higginbotham, join, concurring in part and dissenting in part:

We took this case en banc to decide whether insurance is a "necessary" so that the supplier of insurance is entitled to a maritime lien for insurance premiums under the Maritime Lien Act. I concur in the majority's affirmative answer to this question and the clear persuasive reasons advanced in support of this rule.

I thoroughly disagree, however, with the court's holding that James, who supplied the insurance, did not, as a matter of law, rely on the credit of the vessel and thus waived his lien. This conclusion is bottomed on a finding that James relied on the credit of the vessel owner and others without consciously considering whether he would lien the vessel if the owner defaulted. In holding that this is sufficient to rebut the presumption of reliance by a supplier on the credit of the vessel, the court, without a word of disapproval, overrules at least twenty-five

years of established law in this circuit and create serious practical problems in the enforcement of maritime liens.

I.

Before the adoption of the Maritime Lien Act (lien act), a supplier who claimed a lien for necessaries furnished to a vessel in her home port was required to establish his reliance on the credit of the vessel as an essential element of the lien. G. Gilmore & C. Black, The Law of Admiralty, §9-37 (2d ed. 1975). The circuits were split, however, as to whether the materialman had the burden of establishing reliance on the credit of the vessel. Id. The lien act contains two provisions relevant to this reliance on the credit of the vessel element of the lien. The first, section 971(46 U.S.C. §971), provides that "it shall not be necessary to allege or prove that credit was given to the vessel." The second relevant provision of the lien act, section 974 (46 U.S.C. §974), provides that nothing in the act should be construed to prevent a supplier of necessaries

from waiving his right to a lien "by agreement or otherwise."

Following the adoption of the lien act, the Supreme Court in Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1 (1920), held that the effect of the lien act was to give the materialman the benefit of a presumption that he relied on the credit of the vessel when he furnished necessaries. The law has been exceedingly clear in this circuit, at least since 1958, that this presumption is a strong one that may be rebutted only by showing that the supplier intentionally relinguished his right to a lien. We have consistently rejected the argument that reliance by the supplier on the personal credit of the vessel owner or charterer is sufficient to rebut that presumption.

In Point Landing, Inc. v. Alabama Dry Dock, 261 F.2d 861 (5th Cir.1958) the supplier of a new engine for the vessel took a note from the vessel owner, a chattel mortgage on the vessel and a mortgage on the vessel owner's real estate to secure

the indebtedness for the engine. The vessel owner argued that no lien arose because the note obtained from the owner, along with the conventional security devices to secure that note, reflected that the supplier relied on the credit of the owner rather than the vessel. This argument was soundly rejected. Judge Brown, speaking for the court, announced a rule that has been consistently followed: "In a proper case it might well be that all such acts, with other convincing testimony deemed sufficient to establish it by a preponderance of the evidence, might permit the inference that the supplier purposefully intended to forego the valuable privilege which the law accords and look solely to the owner's personal credit. Here, there was no such proof." 261 F.2d at 867 (emphasis added).

In Gulf Trading and Transporation Co. v. The Vessel HOEGH SHIELD, 658 F.2d 363 (5th Cir.1981), cert. denied, 457 U.S. 1119 (1982), the shipowner argued that the lien had been waived because the supplier dealt with the charterer of the vessel and

had no contact with the vessel owner. The court concluded "[w]e agree with Gulf that when the transaction is considered a whole, nothing was purposely done by Gulf to waive the maritime lien that arose as a matter of statutory law upon the furnishing of bunker fuel to the vessel in a United States port." 658 F.2d at 368. (emphasis added)

In a very recent case, Gulf Oil Trading Co. v. M/V CARIBE MAR, 757 F.2d 743 (5th Cir.1985), we held that the supplier of bunkers had not waived its maritime lien even though the fuel was sold to the charterer which had enjoyed a long business relationship with the supplier and had a fixed dollar line of credit with the supplier. We stated "[b]ecause of the strong presumption in favor of a maritime lien, we have consistently held that it is necessary that a litigant arguing for such a waiver prove that the creditor deliberately intended 'to forego the valuable privilege which the law accords and look solely to the owner's personal credit.'" 757 F.2d at 750 (emphasis in opinion at p. 750). To the same

effect, see Sasportes v. M/V SOL DE COPACABANA, 581 F.2d 1204, 1209-10 (5th Cir.1978); TTT Stevedores of Texas, Inc. v. M/V Jagat Vijeta, 696 F.2d 1135, 1139 (5th Cir.1983). See also Farrell Ocean Services, Inc. v. United States, 681 F.2d 91, 93-94 (1st Cir.1982).

Gilmore & Black, after a thorough discussion of the background of this defense to the assertion of a maritime lien, states: " ... the presumption that the lienor relied on his lien has become all but conclusive." G. Gilmore & C. Black, The Law of Admiralty, §9-38, (2d ed. 1975).

II.

The majority cites three sources in the record that it finds sufficient as a matter of law to establish that James waived its lien.

First, the court points to the cross-examination of James' marine manager, Mr. Hargrove. Before the testimony was given that is relied upon by the court, counsel questioned Hargrove closely about why James did not require either Equilease or Eltra to

sign the Borg-Warner note along with Dunnamis. Counsel then attempted to learn from Mr. Hargrove the identity of the person in the James organization who made the decision to extend credit for the insurance sold on the vessels in question. Hargrove responded that James thought the bill for the insurance premiums would be paid promptly and that a credit transaction was not intended. The series of questions that culminated in the answer relied on by the majority then followed:[1] Nowhere in this

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1. Q. Mr. Hargrove, what did you rely on for payment of those insurance premiums?

   A. Now, why we allowed the premiums to go as long as they did?

   Q. No, sir. What did you rely on for payment of those insurance premiums?

   A. I still don't understand your question. I mean, who —

   Q. Who or what did you rely on?

   A. It was our understanding from the very beginning that Equilease, whether directly or indirectly, and at that time we understood the money was to be given to Dunnamis, we were receiving money from Dunnamis, which was money furnished by

line of questioning did counsel refer to the liability of the vessel or the willingness of James to enforce a lien if the law gave him one. In sum, Hargrove testified that James, as the insured's broker, advanced the premiums in the belief that Eltra or Equilease, two corporations with substantial assets, would see that Dunnamis reimbursed James in the normal course of business. Hargrove was not asked whether he intended to assert a lien against the vessel if the premiums were not paid, but under these circumstances it is reasonable to infer that he did

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(cont.)

Equilease.

Q. So —

A. And again, that's why we allowed the receivables to go as long as they did without payment. I mean, under normal course of business, if it had not been Eltra, Equilease, we would have cancelled that policy a long time prior to the July 20th renewal.

Q. So you are saying you relied only on Dunnamis, Equilease and/or Eltra, is that a fair statement?

A. That's a fair statement.

not consider what collection steps he would take if James' invoice was not paid. As the majority acknowledges, Hargrove did state that he did not intend to give up any right.

The statement in James' brief[2] relied on by the majority in support of its finding that James waived the lien appears in the portion of James' brief dealing with the validity of Equilease's mortgage on the vessel. James was attempting to make the point in this passage of its brief that Dunnamis was a shell corporation acting as agent for its dominant parent, Equilease, the party that funded the entire operation and on whose reputation and credit all parties relied.

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2. The Unilease Companies stand in the same position as a general agent for the operations of the Vessels on behalf of Equilease. There was the requisite mutual inter-dependence on the financial credit and stability of each of the parties. The Unilease Companies were totally funded for the operations of the Vessels by Equilease and it was the credit of Equilease upon which all parties placed total reliance.

The most that can reasonably be inferred from Mr. Hargrove's testimony and the above sentence from James' brief is that James relied on the personal credit of Dunnamis, Equilease and Eltra and no consideration was given to collection procedures that might be followed in the event of default. The record evidence does not suggest any reason James would relinquish his right to a lien and Mr. Hargrove's testimony that James did not intend to give up this right is completely credible. In my view, the record evidence relied on by the majority falls far short of supporting a finding that James intentionally relinquished his right to a lien.

The majority cites an additional reason why James waived his lien: Until today, the law in this circuit did not allow a lien to one providing insurance, so James had no right to rely on the vessel to pay the debt.

Although the significance of this fact is not explained by the majority, I do not read the opinion to hold that James is not entitled to the change in

the law we announce today. It would be novel indeed to hold that the litigant who blazed the trail and persuaded the court to change the law is not entitled to the benefit of that change.

The record does not establish that Mr. Hargrove or anyone else with James knew that James was not entitled to a lien under the law of this circuit when the insurance was furnished. Without proof of such knowledge by James, I fail to see how it can be said that James intentionally relinquished the lien by furnishing necessaries with knowledge that no lien would accrue.

In resolving this issue, the majority seeks to answer the following question: Did James consciously rely on the credit of the vessel when he supplied the insurance. I have no quarrel with the negative answer to that question; it is simply the wrong question. The question which should be asked is whether the record compels the inference that James deliberately or purposefully intended to forego his

right to a lien. The record in my view does not support — much less compel — such an inference.

III.

I am persuaded that the rule adopted by the majority will have several untoward consequences in maritime lien litigation. First, an inordinate amount of unproductive trial time will be expended in an attempt to devine the subjective thoughts of the supplier, particularly at the time of the sale, whether he considered the possibility of liening the vessel of his bill for supplies were not paid. If the supplier is a large concern with distinct sales and credit departments the subjective intent of several persons may be relevant. The small unsophisticated supplier uninformed about liens and unaware that his services or supplies give rise to a maritime lien will face a serious problem. According to the majority, such a supplier who has no knowledge that the vessel is liable for the debt and thus does not rely on the credit of the vessel waives his lien. Many of the larger firms will incorporate language in their

invoices that will negate any intent to waive the lien. But the less sophisticated individuals and small suppliers -- who need lien protection the most -- will frequently lose their lien.

IV.

The holding of the majority that James lost its lien because it did not rely on the credit of the vessel is premised on a erroneous interpretation of the Lien Act. In my view, this holding will have the effect of advancing form over substance and creating unnecessary uncertainty, confusion and litigation in this important area of commercial law. For these reasons, I respectfully dissent from this feature of the court's opinion.

Supreme Court, U.S.
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No. 86-58

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FRED S. JAMES & CO. OF TEXAS, INC.

Petitioner,

Versus

EQUILEASE CORPORATION,
M/V SAMSON, M/V THOR, and M/V HERCULES, ETC.

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

The record does not present for review the questions stated on page i of the Petition for Writ of Certiorari. The essential question presented is:

Whether factual findings made in the courts below are appropriate for review by this Honorable Court.

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IN THE

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OPINIONS AND JUDGMENTS OF COURTS BELOW

The Appendix to the Petition For Writ of Certiorari sets out the district court's opinion after trial on the merits; the original opinion of the U. S. Court of Appeals for the Fifth Circuit dated September 27, 1984; the opinion on rehearing of the United States Court of Appeals for the Fifth Circuit dated April 1, 1985; and the opinion on rehearing en banc of the U.S. Court of Appeals for the Fifth Circuit dated April 25, 1986, as amended May 5, 1986 and May 28, 1986. Those opinions are not reproduced again in this brief but are referred to herein by citation to the appro-

priate page in the Appendix to the Petition For Writ of Certiorari.

The opinion on rehearing en banc of the U. S. Court of Appeals for the Fifth Circuit, dated April 25, 1986, is published at 793 F.2d 598 (5th Cir. 1986).

STATEMENT OF THE CASE

(A) Course of Proceedings and Disposition in Trial Court.

This matter involved three consolidated actions in the trial court at one time. The lowest numbered case, Civil Action No. 80-4785, was dismissed prior to the trial which is the subject of this petition. In Civil Action No. 81-112, Equilease Corporation (hereinafter Equilease) filed a separate foreclosure proceeding against the M/V SAMSON, the M/V HERCULES, and the M/V THOR (the vessels) in order to foreclose on Preferred Maritime Mortgages held by Equilease on each of these vessels. On January 19, 1981, Fred S. James & Co. of Texas, Inc. (hereinafter James), pursuant to a motion, filed a Complaint In Intervention in Civil Action No. 81-112, claiming a state privilege and a maritime lien upon each of the three vessels as a result of alleged unpaid insurance premiums. James also asserted personal claims against Equilease and the owners of each of the vessels, Unilease No. 13, Inc., Unilease No. 14, Inc., and Unilease No. 20, Inc., in the intervention.

Additionally, on January 19, 1981, James filed a separate lawsuit, Civil Action No. 81-234, against Equilease, Dunnamis Offshore Towing, Inc. (hereinafter Dunnamis), Unilease No. 13, Inc., Unilease No. 14, Inc., and Unilease No. 20, Inc. and each of the three vessels *in rem*, alleging substantially identical

claims as contained in the previously mentioned intervention.

On January 3, 1983, the trial court conducted a three day non-jury trial of what remained of the consolidated matters, which basically involved the *in personam* and *in rem* claims asserted by James. After the trial, the trial court took the matter under submission. On March 18, 1983, the trial court rendered written Findings of Fact and Conclusions of Law which granted judgment in favor of James *in personam* against Dunnamis and *in rem* against each of the three vessels allowing a state privilege for the amount sued on, plus legal interest from date of judicial demand, together with 10 percent as attorney's fees and all costs of the proceedings, subject to submission by James within thirty days of a statement showing the proportion of premiums for each particular vessel. The trial court also, at that time, voided the Preferred Maritime Mortgages held by Equilease Corporation insofar as the claims of James are concerned but denied a maritime lien on the basis that insurance was not a necessary under the Federal Maritime Lien Act.

On March 28, 1983, a motion was brought on behalf of each of the three vessels for a new trial seeking an amendment of the trial court's Findings of Fact and Conclusions of Law. The grounds for this motion were that the trial court erred in awarding James attorney's fees against the vessels and erred in granting James a state privilege for premiums due for insurance on the three vessels pursuant to Louisiana Civil Code Article 3237. After oral argument of the Motion For A New Trial, the trial court by Memorandum Order dated May 12, 1983, amended its Judg-

ment to eliminate the imposition of attorney's fees. However, stating orally that it saw no distinction between the underlying debt and the privilege granted by state law, the trial court ratified and confirmed its Judgment allowing a state privilege against each of the three vessels pursuant to Louisiana Civil Code Article 3237.

On May 18, 1983, the trial court signed a Judgment *in personam* against Dunnamis and *in rem* against each of the three vessels in the total amount of $315,820.92, allocating the damages proportionately among the three vessels. On May 26, 1983, Equilease, Unilease No. 13, Inc., Unilease No. 14, Inc., Unilease No. 20, Inc. and each of the vessels filed a Notice of Appeal from the final Judgment in this matter. On June 1, 1983, James filed a Cross Appeal from the same Judgment. Dunnamis has not taken any appeal.

In the Statement Of The Case relating to Course of Proceedings and Disposition in the Trial Court appearing in the Petition For Writ of Certiorari filed herein, James referenced the holdings of the trial court. It should be noted that James failed to mention therein that the trial court specifically found that Dunnamis was not the agent of Equilease.[1]

(B) Course of Proceedings and Disposition in the Appellate Court.

The statements and explanations in the Petition For Writ of Certiorari relative to the course of proceedings and disposition in the appellate court are essentially correct and need no further explanation.

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[1] Appendix to Petition of Writ of Certiorari at page A-11.

(C) Statement of Facts

The facts stated in the Petition For Writ of Certiorari substantially differ from the facts found in the trial and appellate court opinions. The accurate facts are those stated in the lower court opinions. Rather than merely reiterating those facts, respondents respectfully refer this Honorable Court to the facts found in the lower court opinions.[2] The difference between the facts stated by Petitioner and those found in the lower court opinions merely emphasize that Petitioner's challenges herein are truly challenges to findings of fact made below.

SUMMARY OF ARGUMENT

James essentially complains of findings of fact in the lower courts. Such findings of fact are inappropriate for review by writ from this Honorable Court. None of the considerations in this Court's Rule 17 for issuance of a writ is present.

James' main complaint is that the Fifth Circuit En Banc erred in finding that it was clear and uncontradicted from the transcript and record that James did not rely on the credit of the vessels when it advanced the insurance premiums. The finding that James clearly did not rely on the credit of the vessels is a proper factual finding inappropriate for review by writ from this Honorable Court. Moreover, such a finding is completely in line with the well established decisions of this Court allowing the party at-

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[2] Appendix to Petition of Writ of Certiorari at pages A-3 through A-13; A-24 through A-28; A-47 through A-50; A-69 through A-74; A-95 through A-97.

tacking the lien to prove lack of reliance on the credit of the vessel.

In addition, James argues that the finding of the Fifth Circuit En Banc that James did not rely on the credit of the vessels was a *reversal* of a factual finding by the trial court. Such a finding by the Fifth Circuit En Banc was not a reversal of a finding of fact made by the trial court. The Fifth Circuit correctly noted that the trial court did not make a factual finding concerning reliance by James because no maritime lien was awarded by the trial court.[3] The Fifth Circuit correctly proceeded to examine the relevant parts of the transcript and record and found it "clear" and "uncontradicted" that James did not rely on the credit of the vessels. Such a finding is not appropriate for review by writ from this Court and is in line with well-established decisions of this Court allowing undisputed inescapable factual findings by an appellate court.

James also challenges the factual finding that Dunnamis was the agent of Equilease because of the bareboat charter agreement between the parties.The lower courts specifically addressed this factual issue and have concluded that Dunnamis was not the agent of Equilease.[4] Once again, such factual finding is inappropriate for review by writ from this Court.

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[3] Appendix to Petition of Writ of Certiorari at page A-95.

[4] Appendix to Petition of Writ of Certiorari at page A-11; A-65 through A-66.

ARGUMENT

I. Finding That James Did Not Rely On The Credit of the Vessels

James mainly complains herein that the Fifth Circuit En Banc erred in finding that James did not rely on the credit of the vessels. Not only is such a factual finding inappropriate for review by writ, but also is completely in line with well-established jurisprudence emanating from this Court.

The en banc opinion of the Fifth Circuit noted that because the trial court had found that James was not entitled to a federal maritime lien pursuant to *Learned v. Brown*,[5] the trial court did not make a finding on whether James relied on the credit of the vessels.[6] The Fifth Circuit En Banc then specifically examined the relevant parts of the transcript and record and found that:

> [t]he transcript and record make it *clear* that James did not rely on the credit of the insured vessels when advancing the money for the premiums, but rather relied on the credit of Equilease and Dunnamis. The *uncontradicted* testimony and the concession made by James in its brief overcomes the presumption that James relied on the credit of the vessel.[7]

(emphasis added).

The Fifth Circuit En Banc opinion specifically referenced the relevant parts of the transcript and re-

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[5] 94 F.876 (5th Cir. 1899).

[6] Appendix to Petition of Writ of Certiorari at page A-95.

[7] Appendix to Petition of Writ of Certiorari at page A-97.

cord that made it clear and uncontradicted that James did not rely on the credit of the vessels. The Fifth Circuit referenced the specific testimony of the James manager, Keith Hargrove, who handled the pertinent account and who testified at trial that James relied only on the credit of owners and charterer as follows:

> Hargrove was asked on cross examination, "What did you rely on for payment of those insurance premiums?. . . . Who or what did you rely on?" He responded that it had been James' understanding "from the very beginning" that Equilease, whether directly or indirectly was being relied upon, and that James was receiving money from Dunnamis that had been furnished to Dunnamis by Equilease. When the cross examiner probed, "So you are saying you relied *only* on Dunnamis, Equilease, and/or Eltra, is that a fair statement?" Hargrove replied, "That's a fair statement."[8] (Emphasis added).

The Fifth Circuit En Banc opinion further specifically noted the "concession" in James' original brief filed in the Fifth Circuit that James did not rely on the credit of the vessels. The Fifth Circuit specifically pointed out that:

> James itself states in its original brief filed in this court: "The Unilease Companies were totally funded for the operations of the Vessels by Equilease and it was the credit of

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[8] Appendix to Petition of Writ of Certiorari at page A-95 through A-96.

> Equilease upon which all parties placed *total reliance.*[9] (Emphasis added).

James' request that a writ be issued to review such a factual finding is inappropriate. The transcript and record clearly support such a finding of uncontradicted facts which permits only one resolution of the factual issue. Moreover, James' suggestion that such finding is contrary to established law is simply wrong.

James argues that the Fifth Circuit En Banc erred in reversing a factual finding of the trial court. The Fifth Circuit did not reverse any factual finding. To the contrary, the Fifth Circuit En Banc opinion made it clear that the trial court did not make a finding concerning reliance by James. In absence of such a finding, the Fifth Circuit En Banc properly and legitimately examined the transcript and record, finding the transcript and record "clear" and "uncontradicted."[10] It is well established in this Court that an appellate court can examine a transcript and record in absence of a factual finding by the trial court and draw inescapable factual conclusions susceptible of only one resolution. *Kelley v. Southern Pacific Company;*[11] *Dayton Board of Education v. Brinkman;*[12] *Bigelow v. Virgina;*[13] *Levin v. Mississippi River Fuel Corporation;*[14]. This is especially true when the appellate court is in as good a position to evaluate the

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[9] Appendix to Petition of Writ of Certiorari at page A-96.

[10] Appendix to Petition of Writ of Certiorari at page A-97.

[11] 419 U.S. 318 (1974).

[12] 443 U.S. 526, 534-537 (1979).

[13] 421 U.S. 809, 826-827 (1975).

[14] 386 U.S. 162, 170 (1967).

evidence as the trial court, such as when the facts are undisputed and do not depend on the credibility of witnesses. *United States v. Oregon State Medical Society;*[15] *Gulf Towing Company, Inc. v. Steam Tanker Amoco New York;*[16] *Armstrong v. Collier;*[17] *Sbicca-Del Mac, Inc. v. Milius Shoe Company;*[18] *Talley v. U. S. Postal Service.*[19]

In the case presently before this Court, the facts at issue are clear and undisputed. When asked, James admitted at trial and in brief that it did not rely on the credit of the vessel. Instead, James specifically relied "totally" and "only" on the credit of Equilease and Dunnamis. There is no contradictory testimony or evidence. Only one reasonable resolution of this fact is permitted. Effective judicial administration requires the appellate court to draw this inescapable factual conclusion.

James also erroneously argues that the Fifth Circuit En Banc decision is contrary to decisions of this Court in *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*[20] and *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of California,*[21] as well as court of appeals decisions in *Farrell Ocean Services v. United States,*[22] and *Farwest Steel Corporation v.*

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[15] 343 U.S. 326 (1952).

[16] 648 F.2d 242 (5th Cir. 1981).

[17] 536 F.2d 72, 77 (5th Cir. 1976).

[18] 145 F.2d 389, 400 (8th Cir. 1944).

[19] 720 F.2d 505 (8th Cir. 1983).

[20] 254 U.S. 1, 41 S.Ct. 1 (1920).

[21] 310 U.S. 268, 60 S.Ct.937, 84 L.Ed. 998 (1940).

[22] 681 F.2d 91 (1st Cir. 1982).

Barge SEA-SPAN 241.[23] To the contrary, those decisions support the holding of the Fifth Circuit in this matter.

James fails to explain anywhere in its Petition how the en banc opinion herein is contrary to *Piedmont & George's Creek Coal Co., supra.*[24] *Piedmont and George's Creek Coal Co., supra,*[25] holds only that the creditor of the vessel does not have the burden of proving reliance on the credit of the vessel. The decision does not hold that the owner or vessel cannot overcome the presumption and prove that the creditor did not rely on the credit of the vessel.

Piedmont and George's Creek Coal Coal Co., supra,[26] is also supportive of respondents' position herein in two other aspects. First, the decision supports the proposition that findings of fact are normally not appropriate for review by this Court. Second, the decision supports the argument that a maritime lien can only arise if the services or supplies are physically furnished to the vessel. In the event that this Court decides to grant the Petition requested herein, respondents reserve the right to argue on the merits that James is not entitled to a maritime lien for all the reasons enunciated in the en banc brief filed by respondents in the U. S. Court of Appeals For The Fifth Circuit, including: that James failed to prove it was legally subrogated to the claims of the insurers; that marine insurance was not furnished to the ves-

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[23] 769 F.2d 620 (9th Cir. 1985).

[24] 254 U.S.1, 41 S.Ct. 1 (1920).

[25] 254 U.S.1, 41 S.Ct. 1 (1920).

[26] 254 U.S.1, 41 S.Ct. 1 (1920).

sels; that marine insurance is not a necessary for the benefit of the vessels; and that any right to lien status was extinguished when James was paid.

Dampskibsselskabet Dannebrog, supra,[27] is likewise not contrary to but supports the en banc decision of the Fifth Circuit herein. That decision only holds that the creditor does not have to prove reliance on the credit of the vessel. That case does not withdraw the opportunity for the vessel owner to prove that the creditor did not rely on the credit of the vessel. James appears to assert that the presumption that the creditor relied on the credit of the vessels is irrebuttable. The well-established case law is clearly contrary to such an assertion.

Farrell Ocean Services v. U.S, supra,[28] supports the en banc decision at issue and is not contrary to it. In that case, the circuit court made it clear that the party attacking the lien has the burden of overcoming the presumption of reliance by showing that the party rendering the service relied solely on the personal credit of the owners or charterers, citing *Marshall & Company v. THE PRESIDENT ARTHUR,*[29] for support as the leading case from this Court on waiver. In *Farrell Ocean Services, supra,*[30] the Court simply found that the factual circumstances did not prove lack of reliance on the credit of the vessel. In the case presently before this Honorable Court, the record is clear and uncontradicted. James specifically testi-

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[27] 310 U.S. 268, 60 S.Ct. 937, 84 L.Ed. 998 (1940).

[28] 681 F.2d 91 (1st Cir. 1982).

[29] 279 U.S. 564 (1929).

[30] 681 F.2d 91 (1st Cir. 1982).

fied that it did not rely on the credit of the vessels. There is no need to examine any other factual circumstances. The testimony speaks for itself.

In its Petition, James alleges but does not explain how the en banc decision herein is contrary to *Farwest Steel Corp., supra.*[31] *Farwest Steel Corp., supra,*[32] upholds the law that a maritime lien does not arise unless the lienholder relies on the credit of the vessel. More specifically, this decision relies on *Marshall & Co., supra,*[33] for the proposition that where a supplier relies on the contractor and not the barge as a source of payment, a maritime lien will be denied.[34] *Farwest Steel Corp., supra,*[35] also supports the holding that the item must be supplied "to" the vessel in order to be entitled to maritime lien status.

In the leading case on the issue, this Court in *Marshall & Co., supra,*[36] addressed the issue of waiver of a maritime lien. The furnisher of the supplies wanted additional security from the owner of the vessel prior to furnishing the supplies. It was held that the Federal Maritime Lien Act is not construed to prevent a furnisher of supplies from waiving his right to a lien by agreement or otherwise. An express renunciation of the lien is not essential. This Court held that if the evidence shows that the owner and not the vessel was relied on for credit, a maritime lien does not attach.

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[31] 769 F.2d 620 (9th Cir. 1985).

[32] 769 F.2d 620 (9th Cir. 1985).

[33] 279 U.S. 564 (1929).

[34] 769 F.2d at 624.

[35] 769 F.2d at 620.

[36] 279 U.S. 564 (1929).

In the case presently before this Honorable Court on Petition For Writ of Certiorari, the facts are clear through the testimony that James relied "only" on the owners and not on the credit of the vessels. Such a fact does not give rise to a maritime lien. Such a finding is factual and completely in line with well-established decisions of this Honorable Court.

II. Finding That Dunnamis Was Not The Agent of Equilease

James argues that the bareboat charter agreement between Dunnamis and Equilease created an agency relationship between the parties. The trial court specifically addressed the issue of agency and held:

> Although Denning received "favorite son" treatment from Equilease throughout this period, this treatment did not make him the agent of Equilease.[37]

Additionally, the Fifth Circuit Court of Appeals addressed the argument by James that Dunnamis was the agent of Equilease rather than a bareboat charterer.[38] The Fifth Circuit Court of Appeals held that:

> The existence of agency is a question of fact which should not be reversed on appeal unless it is clearly erroneous. . . .[39]

The Fifth Circuit Court of Appeals held that the district court was not clearly erroneous in its conclusion that Denning was not the agent of Equilease.[40] The

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[37] Appendix to Petition of Writ of Certiorari at page A-11.

[38] Appendix to Petition of Writ of Certiorari at page A-65.

[39] Appendix to Petition of Writ of Certiorari at page A-66.

[40] Appendix to Petition of Writ of Certiorari at page A-66.

existence of agency is a question of fact which has been previously addressed by the trial court and the Fifth Circuit Court of Appeals. Such a question of fact is not appropriate for review by this Honorable Court and is not clearly erroneous under applicable law.

CONCLUSION

In its Petition For Writ of Certiorari, James seeks review of findings by the Fifth Circuit Court of Appeals En Banc that James did not rely on the credit of the vessels and that Dunnamis was the agent of Equilease. Both findings involve questions of fact which are not appropriate for review by this Honorable Court pursuant to a writ of certiorari.

Moreover, the findings challenged by James are completely in line with well-established decisions of this Honorable Court. Respondents had the right to and did prove through the testimony of James itself that James did not rely on the credit of the vessels. Such testimony is clear and uncontradicted and permits only one resolution of such fact. In addition, the trial court and the Fifth Circuit Court of Appeals specifically addressed the issue of agency and found that Dunnamis was not the agent of Equilease. This Court should deny the Petition For Writ of Certiorari.

Respectfully submitted,

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NO. 86-58

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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

FRED S. JAMES & CO. OF TEXAS, INC.

Petitioner

VERSUS

EQUILEASE CORPORATION,
M/V SAMSON, M/V THOR, and M/V HERCULES, ETC.

Respondents

REPLY BRIEF OF FRED S. JAMES & CO. OF TEXAS, INC. TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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16 pp

CERTIFICATE OF INTERESTED PARTIES PURSUANT TO RULE 21.1(B)

The parties having an interest in the outcome of this case remain the same as outlined in the original Petition filed by FRED S. JAMES & CO. OF TEXAS, INC.

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73 L.Ed. 846 (1929) 5,6,8

STATEMENT OF THE CASE

RESPONSE TO THE FACTUAL ALLEGATIONS OF RESPONDENTS

The assertion by Respondents[1] that the trial court specifically found and concluded that Dunnamis Offshore Towing, Inc. was not the agent of Equilease is not to be found in the transcript of the colloquy of the trial judge, is not to be found in the written Findings of Fact and Conclusions of Law, is not to be found in the Judgment and, is not to be found anywhere else. What the trial court actually found was that James Denning, who was formerly employed by Equilease in various functions including the construction of the Vessels, was not the agent of Equilease at the time he informed Fred S. James & Co. of Texas, Inc. ("James") that the insurance premiums would be paid by Equilease. This finding had no reference whatsoever to the validity of the charter parties, which the trial court, having found

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1. Respondents' Brief, page 10.

that James was entitled to full recovery under the state created lien, never addressed.

In its Second Opinion, the Fifth Circuit transformed the identity of the individual, Denning, into the corporate entity of Dunnamis Offshore Towing, Inc., and related the transformation to the validity of the charter parties as a finding of fact by the trial court.[2] This lack of agency of the guarantor of payment has absolutely no relationship to the legal requirement that to be valid, a bareboat charter party must be a complete surrender of management, custody and control of the vessel by the owner to the charterer.

As to the assertion on page 10 of Respondents' brief that "James admitted at trial and in brief that it did not rely on the credit of the vessel", the transcript of testimony, the record and the memoranda belie such an assertion. Never has James

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2. 756 F.2d 357, 363 (5th Cir. 1985).

stated orally or in writing that it did not rely on the credit of the Vessels.

Respondents suggest to the Court that James' reliance upon Dunnamis, Equilease and Eltra for payment is an admission that James did not rely on the credit of the vessel in the event of default of payment. A lienor may relay on the credit of others while at the same time relying on the credit of a vessel. As to reliance on the credit of the Vessels, besides the filing of the liens under the Louisiana Civil Code, the institution of in rem proceedings against the Vessels, the intervention in the foreclosure proceedings by Equilease, and the filing of liens under the Federal Maritime Lien Act, the transcript of trial clearly indicates that James relied upon the earnings of the Vessels when supposedly

placed under profitable charters in Mexican waters.[3] A finding that James relied upon the earnings of the Vessels for payment of the premiums, a clear indication upon the reliance of the credit of the Vessels[4], is totally inconsistent with a finding that James did not rely on the credit of the Vessels.

As to the charter parties, it is interesting to note that Respondents' only argument as to the validity of the charter parties is to take the issue of agency of the individual, Denning, transfer the individual into a separate and distinct corporate entity, take the non-existent finding out of context, and contend that such a finding is dispositive of the complete surrender and control of the Vessels. There

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3. The Fifth Circuit in its Second Opinion, adopted this finding of fact by the trial court and specifically found that, "Relying on this information, James decided to provide insurance for the three Vessels for another year rather than cancelling the policy and bringing suit for the unpaid premium". Appendix A48.

4. See, Fielder v. Bay Const. Co., 5 F.2d 227 (5th Cir.1925); Contra, Barnes v. The Kongo, 174 F.2d 67 (6th Cir. 1949).

is not one case that can be cited by Respondents where a demise or bareboat charter party containing just one of the factors of control exercised by Equilease has been held valid where two or more of the eight factors of control exist. The absence of a response is evidence of an inability to respond and an admission that the charter parties, like the preferred ship mortgages, do not meet the criteria established by this Court.[5]

SUMMARY OF THE ARGUMENT

A person seeking to show that a lienor has waived his lien has the burden of proof that the lienor has affirmatively waived this valuable privilege.

ARGUMENT

Respondents cite the decision of this Court in Marshall & Company v. The PRESIDENT ARTHUR[6] for the proposition that "If the evidence shows that

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5. Guzman v. Pichirilo, 369 U.S. 698, 699-701, 82 S.Ct. 1095, 1096, 8 L.Ed.2d 205 (1962).

6. 279 U.S. 564, 49 S.Ct. 420, 73 L.Ed. 846 (1929).

the owner and not the vessel was relied on for credit, a maritime lien does not attach."[7] Such interpretation neither corresponds to the opinion by this Court nor to its progeny. In PRESIDENT ARTHUR, this Court clearly stated that there must be affirmative action on the part of the lienor to express a clear and unequivocable intent of waiver stating:

> "...by taking other and different security, upon which it (the lienor) relied, and which it still retains, without stipulating for the retention of the lien, it has waived the lien which it otherwise would have had."[8]

The various circuits have understood and interpreted the language of PRESIDENT ARTHUR as follows:

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7. Respondent's Brief, page 13.

8. Supra.

First Circuit:

> It is not enough, however, to show that the supplier relied in part on the credit of the owner's agent or the owner. The party entitled to the lien must have taken "affirmative action that manifests a clear intention to forego the lien".[9]

Second Circuit:

> The taking of a security for performance of the owner's personal obligation should not be construed as evidencing an intention to relinquish the existing lien on the vessel unless such an intention clearly appears.[10]

Fourth Circuit:

> The record is devoid of any indication that the claimants waived or intended to waive their right to liens therefore on the boat as permitted by the statute and hence it is immaterial, in considering their right to a lien for necessaries under the statute, that the supplies were ordered by the owner and that the sellers relied upon the credit of both the owner and the ship.[11]

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9. Farrell Ocean Services, Inc. v. U.S., 681 F.2d 91, 93 (1st Cir. 1982).

10. In Re: Marine Transit Corp., 94 F.2d 7 (2nd Cir. 1938).

11. Jeffrey v. Henderson Bros., 193 F.2d 589, 593 (4th Cir. 1951).

Ninth Circuit:

> Whether Farwest (the "Lienor") placed any reliance on the Barge is a question of fact. We must remand to resolve that factual issue ... . If the district court finds that Far West placed some reliance on the barge, under the statutory presumption in favor of materialmen under the Lien Act,... Farwest is entitled to a federal lien.[12]

As the opinions show, a finding or conclusion that a lienor has waived his lien and relied exclusively on the owner for payment will be sustained only in a case similar to PRESIDENT ARTHUR[13] where the lienor accepts an alternative form of security that is exclusive of the federal maritime lien. James neither accepted an alternate form of security, in any way, nor affirmatively waived its lien.

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12. Farwest Steel Corp. v. Barge SEA-SPAN 241, 769 F.2d 620, 624 (9th Cir. 1985).

13. Supra.

CONCLUSION

The fact that the Fifth Circuit has rendered three separate and conflicting opinions, (the En Banc requiring two amendments to conform to the record), demonstrates the fallibility of an appellate court in fashioning findings of fact from a complex record containing multiple legal issues.[14] The dissent by three judges as to the factual findings by the majority is a clear indication that the En Banc decision violated the mandate of Icicle Seafoods, Inc. v. Northington.[15] The conundrum resulting from the inconsistent and unsupported de novo findings of fact by the appellate court aptly justifies the necessity for certiorari to set forth the legal criteria to justify

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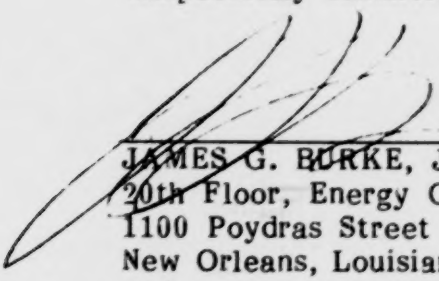
14. At trial, James had asserted four separate and distinct causes of action, any one of which would have permitted full recovery. The trial court, apparently exercising judicial economy, decided in favor of James on the state-created lien and left unresolved the remaining issues relating to the validity of the bareboat charter and unjust enrichment.

15. ____ U.S. ____, 106 S.Ct. 1527, 1530, 88 L.Ed.2d 224, 332 (1986).

waiver and the legal prerequisite for a valid demise or bareboat charter.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a member of the Bar of this Court representing the Petitioner herein and that three copies of the above Reply Brief were served upon:

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counsel for the respondent, first class postage prepaid, this 7th day of November, 1986.

JAMES G. BURKE, JR.
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